United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

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Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,587

836

E. G. ROBINSON, JR., tr/as
PALMETTO BROADCASTING COMPANY (WDKD),
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

On Appeal from a Decision and Order of the
Federal Communications Commission

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July 5, 1963

QUESTION PRESENTED

Whether the Commission's action in the circumstances of this case in refusing to renew the license of Station WDKD because of broadcasts by a disc jockey, which broadcasts the Commission found in an administrative proceeding on WDKD's renewal to be "coarse, vulgar, suggestive, and susceptible of indecent, double meaning," was violative of the First Amendment and of 47 U.S.C. Sec. 326, and in other respects arbitrary, illegal, and contrary to the public interest.[1]

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[1] Appellee believes that the following separately stated issues are also presented:

1. Whether the Commission correctly held that misrepresentations by the licensee independently warranted denial of renewal.

2. Whether the Commission correctly held that the resolution of two additional issues adversely to the licensee made the case for denial of renewal compelling.

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JURISDICTIONAL STATEMENT

This is an appeal by E. G. Robinson, Jr., tr/as Palmetto Broadcasting Company, licensee of Station WDKD, Kingstree, S. C. (1310 kc, 5 kw, D): (a) From a Decision of the Federal Communications Commission released July 26, 1962, wherein the Commission refused to renew the license of Station WDKD (33 FCC 250-308; R. 1416-1435); and (b) from a Commission Memorandum Opinion and Order released January 7, 1963 denying a petition for reconsideration of the aforesaid action (R. 1580-1585).

The jurisdiction of this Court is invoked under Section 402(b)(1) and (2) and Section 405 of the Communications Act of 1934 as amended (47 U.S.C. Secs. 402(b)(1) and (2), and 405), Section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 1009), and Rule 37 of the Rules of this Court.

STATEMENT OF THE CASE

Radio Station WDKD, restricted to daytime hours, is the only broadcast facility licensed to Kingstree, S. C., a town with a 1960 population of 3847 persons (R. 205-210, 896). Operating with 5 kw power on 1310 kc, Station WDKD serves a number of small towns, in addition to Kingstree, in Williamsburg and adjoining counties in South Carolina, an area which is largely agricultural (tobacco, cotton, and pine-tree products), with a population which is predominantly Negro (WDKD Ex. 2, R. 205-210, 896, Tr. 358-359).

From its establishment in 1949 until 1956 Station WDKD was operated by appellant, E. G. Robinson, Jr. as a 50% partner, and since that date by him as the sole licensee (Tr. 119, 244). From 1950 to 1960 (except for two years in the armed services during the Korean conflict), one Charlie Walker was employed at Station WDKD as an announcer and disc jockey (Tr. 136, 223-224). During most of this period Walker had three shows of his own each weekday, consisting of musical records interspersed with patter and commercial announcements -- a two-hour show during early morning hours, a similar hour show around noon, and another hour show in late afternoon (Tr. 136-137). On these shows he used music designed to appeal particularly to rural listeners (cf. R. 879, Fdg. 9; cf. Tr. 128), and over the years developed a substantial following (Tr. 138, 414; R. 879, Fdg. 9). Throughout this period, until matters now to be outlined arose, WDKD's license was periodically and regularly renewed by the Commission.

In April 1960 (see R. 35), some seven or eight months before WDKD's license was due to expire on December 1, 1960, a competing station in

nearby Lake City, S. C. supplied the Commission with six tapes which purported to be off-the-air recordings of certain shows, or portions thereof (Tr. 604), broadcast over WDKD by Charlie Walker (cf. R. 888-889, Fdg. 36).[1]

By letter dated May 11, 1960, with a copy to his then Washington counsel, the Commission notified appellant that it had received complaints that certain program material broadcast on the Charlie Walker shows was "vulgar and suggestive . . . susceptible of double meanings with indecent connotations," and that tape recordings of some of WDKD's programs (without identifying the dates or the period involved) "are in the possession of the Commission" (WDKD Ex. 3, R. 211). The letter went on to state (R. 211):

> It is the practice of the Commission to associate complaints with the files of the station involved and afford the licensees an opportunity to submit a statement with respect thereto.[2] Accordingly, this matter is being brought to your attention.

Upon receipt of this letter appellant immediately talked to Walker, who denied knowledge of having broadcast any "vulgar or suggestive" material over WDKD (Tr. 142; R. 212). Appellant then telephoned his Washington counsel, who thereupon informally requested permission of the Commission's staff to listen to the tapes in question (R. 212). With that request refused appellant's counsel on May 20, 1960, addressed the following letter to the Commission, stating in pertinent part (WDKD Ex. 4, R. 212):

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[1] The Commission's Broadcast Bureau repeatedly refused to divulge the source of these tapes until after appellant had presented his case-in-chief in the hearing subsequently ordered on his renewal (see R. 3-15; Tr. 322). Appellant's counsel sought such information so as to check whether the stories and jokes, as distinguished from the punning epithets Walker used to identify several nearby towns, were broadcast over the air or whether (as Walker asserted to appellant) they were told by him at smokers where his remarks were occasionally taped (see R. 8, 18, 34, 36).

[2] Except where otherwise indicated emphasis is supplied throughout this brief.

Station WDKD has no knowledge of having broadcast any "vulgar or suggestive" programs . . .

The undersigned [attorney] has been supplied [by the station] with and listened to a tape of a typical Charlie Walker program. No instances of vulgarity or suggestiveness were noted.

In order for a reply to be made to your letter of May 11th, request is hereby formally made for permission to hear the tapes in question and for information concerning the exact time and date of the broadcasts, as well as the name of the person or station making the charges. As soon as this data is supplied, every effort will be made to investigate the matter.

In the meantime, in an effort to exercise the utmost caution, the licensee has conferred with Mr. Walker who has denied knowledge of broadcasting anything which might fall in the category of vulgarity or suggestiveness. Mr. Walker has nonetheless been requested to be extremely circumspect in his broadcasts.

Thereafter, on June 8, 1960, appellant's counsel was permitted to listen to excerpts from certain of these tapes and to make notes thereon, whereupon she advised her client that certain excerpts which she had heard (eight items) were improper, that Walker should be discharged, and that procedures should be established to prevent any recurrences (WDKD Ex. 5, R. 213-214). By letter of June 10, 1960, appellant advised the Commission as follows (WDKD Ex. 6, R. 215; cf. R. 2):

> I am writing this letter to you as the owner and operator of Radio Station WDKD at Kingstree, South Carolina.
>
> I have just learned through the medium of a letter written to me by my Attorneys in Washington, Daly & Ehrig, who have advised me in partial detail of certain taped shows of an employee of mine by the name of Charlie Walker. In this letter, several quotations from the taped shows are set out in detail. These statements made by my employee, Charlie Walker, were not known to me, and I cannot help but agree that they are suggestive and, in some cases, of a vulgar nature. As a result of this information and in line with my avowed policy of maintaining a clean and decent Radio Station, I have unconditionally released Charlie Walker from my employ as of the date of this letter.

I want to stress to you the fact that I was not acquainted with the nature of the statements made by Charlie Walker and the show on the air at my Radio Station, and I can assure you that the only accusation which could be leveled at me is that perhaps I should have followed these matters more closely and should have known exactly what was going on. As you know, it is impossible for the owner and operator of a Radio Station to have first-hand knowledge of every statement made by his employees. The important thing is that, immediately upon learning of the nature of these statements, I have released this man, and I can assure you that there will be no repetition of this sort of problem at my Station. In addition to this, I have distributed instructions among my employees, and have established a policy which will insure against any such statements as these being made through the medium of my Radio Station in the future.

I sincerely hope and trust that this explanation will be acceptable to you. However, if there is any further statement or information you would care to have from me, I will be glad to cooperate in any way possible.

By affidavits dated June 10, 13 and 22, 1960, Robinson further confirmed the fact that he had discharged Walker and that he had established procedures designed to prevent any objectionable matter from being broadcast thereafter over WDKD (WDKD Exs. 7-9, R. 216-218).

So far as the instant record shows, no further correspondence immediately ensued, although the record does indicate that an on-the-scene investigation by a member of the Commission's staff was made in August of 1960 (Tr. 124-125). By application sworn to August 31, 1960 appellant, as required by the Commission's Rules, applied for a regular renewal some three months in advance of the expiration date of his then current license (R. 10 -104). Another period of silence followed.

Finally, on March 21, 1961, the Commission released an Order designating WDKD's renewal for hearing in Kingstree, S. C. (26 Fed. Reg. 2540, R. 106-107). The Order in pertinent part, as subsequently amended by an Opinion released May 4, 1961 (R. 173-176), was worded as follows (R. 106-107; Tr. 112-115):

> The Commission having under consideration (1) the above-captioned applications; (2) the Commission's letter of May

11, 1960 to said licensee; (3) the replies and affidavits dated June 10, 13 and 22, 1960 filed by said licensee; and (4) the Commission's field inquiry with respect to the operations of Station WDKD; and

IT APPEARING, That in the Commission's letter of May 11, 1960, it was brought to said licensee's attention that the Commission had information, including tape recordings, concerning certain program material broadcast by said station, with particular reference to the Charlie Walker programs, and that said broadcast material was allegedly vulgar, suggestive and susceptible of double meanings with possible indecent connotations; and

IT FURTHER APPEARING, That in the licensee's replies and affidavits, said licensee disclaimed knowledge of the nature of the statements broadcast by said Charlie Walker over said radio station and stated further that immediately upon learning of the nature of the statements, said licensee discharged said Charlie Walker; and

IT FURTHER APPEARING, That written and oral statements submitted to the Commission by the licensee with respect to the above matters contained misrepresentations and/or were lacking in candor; and

IT FURTHER APPEARING, That the licensee failed to exercise a reasonable degree of control over programming material broadcast over said station consistent with operation in the public interest; and that program material was broadcast over his station which was coarse, vulgar, suggestive, and susceptible of indecent double meanings; and

IT FURTHER APPEARING, That, after consideration of the foregoing, the Commission is unable to find that a grant of the subject applications would serve the public interest, convenience or necessity; and that said applications must be designated for hearing on the issues specified below;

IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the instant applications ARE DESIGNATED FOR HEARING at or near Kingstree, South Carolina, at a time to be specified in a subsequent Order, upon the following issues:

(1) To determine whether in the written or oral statements to the Commission with respect to the above matters, the licensee misrepresented facts to the Commission and/or was lacking in candor.

(2) To determine whether the licensee maintained adequate control or supervision of programming material broadcast over his station during the period of

his most recent license renewal.[1]

(3) To determine whether the licensee permitted program material to be broadcast over station WDKD on the Charlie Walker show, particularly during the period between January 1, 1960, and April 30, 1960, which program material was coarse, vulgar, suggestive, and susceptible of indecent, double meaning.

(4) To determine the manner in which the programming broadcast by the licensee during the period of his most recent license renewal has met the needs of the areas and populations served by the station.[1]

(5) To determine whether, in light of the evidence adduced with respect to the foregoing issues, the licensee possesses the requisite qualifications to be a licensee of the Commission.

(6) To determine whether, in light of the evidence adduced with respect to the foregoing issues, a grant of the above-captioned applications would serve the public interest, convenience, or necessity.

The hearing was held before Examiner Donahue in Kingstree on May 31 and June 1, 2, and 5, 1961, during which 18 witnesses appeared on behalf of the appellant and 10 on behalf of the Bureau (R. 876). Nine resolutions, signed by some 65 civic, governmental, religious, and other leaders of Kingstree and neighboring communities, urging renewal of WDKD's license, were there duly received in evidence (WDKD Exs. 12-20, R. 377-385).

In an Initial Decision released December 12, 1961, the Examiner held that "the pivotal issue in this case is issue 3" (33 FCC 265, 295; R. 911, Concl. 1). He then proceeded to equate "obscenity", as used in 18 U.S.C. Sec. 1464, with "coarse, vulgar, suggestive and susceptible of indecent double meaning," as used in Issue 3 (R. 912, Concl. 3). Although of the view that the Roth test of "obscenity" (354 U.S. 476) was not applicable in the broadcast field (R. 915, Concl. 7), he nevertheless concluded "that even under the Roth test the Walker broadcasts here at issue are

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[1] The underscored portion of Issue 2, and Issue 4 as here numbered, were added on May 4, 1960 as a result of subsequent requests by appellant for clarification and enlargement of the issues (see R. 173-176).

obscene and indecent and, a fortiori, coarse, vulgar, suggestive, and susceptible of indecent double meaning," and that the material in question, without employing the Roth test, was "obscene and indecent on its face" (R. 917, Concl. 10).

With respect to Issue 2 -- whether Robinson maintained adequate control and supervision over his station -- it was the Examiner's view that licensees "must assume responsibility for all material broadcast through their facilities," and that such suggestions as Robinson had advanced during the hearing (ill health, inadequate subordinates, popularity of talent, and ignorance of the true character of the broadcast material in question) could not be accepted as in any way relieving him of that responsibility (R. 918, Concl. 11).

With respect to Issue 1 dealing with candor, the Examiner concluded that Robinson knew the true character of Walker's broadcasts, and that his denial thereof through counsel and in affidavits submitted prior to the hearing was a "studied misrepresentation of fact" (R. 918, Concl. 12).

On the programming issue (Issue 4), though deficient under "Blue Book standards", it was the Examiner's opinion, "excluding the fact that obscenities were broadcast over the station, WDKD's record of past performance has met the needs of the community it serves little better or little worse than most other standard broadcasting stations operating under like conditions" (R. 920, Concl. 15).

Although thus finding adverse to appellant on the four factual issues, the Examiner was of the opinion that the question of what to do with the renewal application was a "close one" (R. 925, Concl. 25) -- since Robinson had not been forewarned (R. 922, Concl. 19), since Robinson's efforts in improving the Kingstree area were not wholly without public interest connotations (R. 922, Concl. 20), since Robinson would not again (the Examiner felt sure) permit obscene matter to be aired over WDKD (R. 922, Concl. 21), since Robinson is now truly contrite (R. 922-923, Concl. 22), and since Robinson had marshaled "a formidable expression of community

support for the retention of his license" (R. 923-924, Concl. 23). However, since the Examiner was precluded (for procedural reasons) from imposing a penalty somewhere between a grant and a denial, since a token punishment alone would not suffice, and since this case must stand as a "warning" to others, "those considerations override those running in favor of granting the applications" (R. 927, Concl. 27).

Following exceptions and oral argument before the Commission en banc, though coming to the same end result and though adopting many of his evidentiary findings, the Commission disagreed with key aspects of the Examiner's Initial Decision (33 FCC 250-264; R. 1416-1435). Unlike the Examiner the Commission denied that Issue 3 was "pivotal" (R. 1420, para. 13) and concluded that Issue 1 was "just as important," and standing alone required a denial here (R. 1420, 1426, paras. 13, 25). After refusing to equate "obscenity" with the language used in Issue 3 (R. 1422, para. 19), the Commission then concluded that "by any standard" the Walker broadcasts were "obviously offensive and patently vulgar," "and thus contrary to the public interest" -- and that a refusal to renew WDKD's license on that ground impinged on neither the First Amendment nor 47 U.S.C. Sec. 326 (R. 1424-1425, paras. 22 and 23).

While a short-term renewal might be appropriate with respect to derelictions found in connection with Issues 2 and 4, if standing by themselves, the Commission was of the view, when coupled with conclusions reached under Issues 1 and 3, that public interest required the imposition of the "death penalty" (R. 1421, 1425-1426, paras. 16, 24). The Commission explicitly rejected the Examiner's views that the case was a "close one" (R. 1426, para. 25) and struck the Examiner's conclusions 18, 19, 20, 21 and 24 setting forth matters which in his opinion militated against the imposition of the "death sentence" here (R. 1435).

In a Memorandum Opinion and Order released January 7, 1963, the Commission denied Robinson's petition for reconsideration, and adhered to its previously stated views (R. 1580-1585). This appeal followed.

STATUTES INVOLVED

The First Amendment to the United States Constitution and pertinent portions of the Communications Act of 1934, as amended (47 U.S.C. Sec. 151 et seq.) are printed as an appendix hereto.

STATEMENT OF POINTS

1. The Commission's July 26, 1962, Decision and its January 7, 1963 Memorandum Opinion and Order are not supported by the record or the findings, are inconsistent with applicable judicial and administrative precedents and, therefore, are arbitrary and erroneous.

2. The Commission erred in fact and in law in not concluding that the public interest will be served by a grant of WDKD's applications for renewal of station license and for license to cover construction permit which authorized changes in the station's antenna system.

SUMMARY OF ARGUMENT

I.

Although a licensing system is unavoidable in the radio field, and although Congress has made "public interest, convenience, and necessity" the touchstone for determining whether a license should issue, the Commission's powers to impose its own program views and tastes in non-comparative renewal proceedings is not unlimited. National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943); 47 U.S.C. Sec. 326. A majority of the present Supreme Court has made it clear that any examination into "program content" by an administrative agency, functioning under a broad "public interest" or "general welfare" standard contravenes First Amendment freedoms. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Bantam Books, Inc. v. Sullivan, 31 Law Week 4192 (U.S. Sup. Ct. 1963); Farmers Union v. WDAY, Inc., 360 U.S. 525, 527 (1960); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J. concurring).

While Congress when it creates a licensing authority may lay down broad guides which the Courts will sustain against a broadside challenge of vagueness, the cases make it clear that stricter standards of permissible statutory vagueness may be applied to a statute having a particular inhibiting effect on speech. "Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression." Smith v. California, 361 U.S. 147, 150-151 (1959). In short, as well stated by Justice Douglas in dissent, "Where the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistence is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control." United States v. International Union, 352 U.S. 567, 596 (1957).

In recent decisions, particularly where an administrative agency functions as both prosecutor and judge, the Supreme Court has taken a particularly dim view of intrusions into program content in the exercise by such agency of its licensing functions. Bantam Books v. Sullivan, 31 Law Week 4192 (U.S. Sup. Ct. 1963). The censor or licensor, "no matter how respectable his cause, cannot have the support of government. It is not for the government to pick and choose according to the standards of any religious, political or philosophical group." Times Film Corp. v. Chicago, 365 U.S. 43 (Warren, C.J., Black, Douglas, and Brennan, JJ., dissenting). The cases striking down ordinances requiring a permit or license to use the streets, parks, or other government property negate any theory that because the airwaves are "public property" the federal government can impose conditions on the use thereof which but for that fact would contravene the First Amendment. Kunz v. New York, 340 U.S. 290 (1951); Hannegan v. Esquire, 327 U.S. 146 (1946).

Although "obscenity" is not protected by the First Amendment, matters short of obscenity are, and the dividing line between the two must be

drawn under the "most rigorous procedural safeguards." Bantam Books, Inc. v. Sullivan, 31 Law Week 4192, 4194, 4196 (U.S. Sup. Ct. 1963). Having deliberately eschewed equating "obscenity" with "coarse and vulgar," the Commission's examination into program content (under Issues 2, 3 and 4) cannot be defended on the ground that Walker's broadcasts are not within the protection of the First Amendment. That the Commission's conclusions under Issues 2, 3 and 4 (and to a lesser degree under Issue 1) stem from an examination into program content, in contravention of the First Amendment and the no censorship provisions of 47 U.S.C. Sec. 326 is scarcely debatable.

II.

The Commission's attempt to preclude judicial review of its foray into program content, in violation of the First Amendment and 47 U.S.C. Sec. 326, by interjecting a misrepresentation issue predicated on Robinson's response to the Commission's inquiries regarding his programming is wholly unjustified by the record, arbitrary, and unwarranted, particularly where basic constitutional freedoms are involved. See Ker v. California, 31 Law Week 4611, 4614 (U.S. Sup. Ct. 1963).

In short, with the Commission's denial of WDKD's license bottomed on an examination into program content in a proceeding where the Commission was both prosecutor and judge, the decision here challenged contravenes the First Amendment and 47 U.S.C. Sec. 326, and was in other respects arbitrary, illegal and contrary to the public interest. The broad rationale of two earlier decisions of this Court sustaining forays by the Federal Radio Commission into program content at renewal time, should be reexamined in the light of intervening Supreme Court pronouncements.

ARGUMENT

I.

INSOFAR AS THE COMMISSION'S DENIAL OF WDKD'S RENEWAL WAS BOTTOMED ON PROGRAM CONTENT, ITS ACTION CONTRAVENED THE FIRST AMENDMENT AND 47 U.S.C. SEC. 326

Although this Court in two early decisions, one of which antedates Near v. Minnesota, 283 U.S. 697 (1931), concluded that the Federal Radio Commission could delve into program content when a broadcast station's license was up for renewal, without thereby contravening the guarantees of the First Amendment and the no-censorship provisions of the Federal Radio Act, more recent pronouncements of the Supreme Court cast considerable doubt on the soundness of the doctrines thus enunciated by this Court in KFKB Broadcasting Ass'n v. Federal Radio Commission, 60 App. D.C. 79, 47 F.2d 670 (1931) and Trinity Methodist Church, South v. Federal Radio Commission, 61 App. D.C. 311, 62 F.2d 850 (1932), cert. den. 284 U.S. 685 (1932), 288 U.S. 599 (1933). The problem is one of sufficient importance to merit careful reexamination in the light of intervening Supreme Court decisions.[1]

A. **Basics.** -- Just as the First Amendment provides that "Congress shall make no law respecting an establishment of religion," so it provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." This prohibition is binding not only on Congress but also on administrative agencies which it creates, with the result that they too can adopt no rule, regulation, or policy "abridging the freedom of speech, or of the press." Cf. 47 U.S.C. Sec. 326.

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[1] For example, if the Commission were to deny a renewal, as contrary to the "public interest", because a station had failed to make time available for various churches in its community (a long-standing Commission policy requirement), or if the Commission were similarly to deny a renewal because a licensee had permitted one minister to attack the tenets of another religious group (in contravention of the NAB Code), thus delving into "program content", would it not be clear, in the light of the recent school prayer cases, that such action would violate the government's "neutral" role in religious matters imposed by the First Amendment?

Just as the power "to regulate commerce" is not confined to the modes of transportation known to the Founding Fathers, so the guarantees of the First Amendment are not restricted to modes of communication in use when the Bill of Rights was adopted. The guarantees of the First Amendment protect subsequent advances in means and methods of transmitting thoughts and ideas -- by loudspeakers, facsimile, motion pictures, radio and television. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), cited with approval in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952); Superior Films v. Department of Education, 346 U.S. 587, 589 (1954) (concurring opinion of Douglas, J.); Kovacs v. Cooper, 336 U.S. 77 (1949); Times Film Corp. v. Chicago, 365 U.S. 43, 77 (1961); see also Program Policy Statement of July 1960, 20 RR 1901, 1905-1906 (1960). The safeguards of the First Amendment embrace all vehicles "of information and opinion." Cf. Lovell v. Griffin, 303 U.S. 444, 452 (1938).

Any notion that the freedoms of the First Amendment are restricted to the news or the editorial pages, and do not cover the advertising pages of a newspaper was laid to rest in Grossjean v. American Press Co., 297 U.S. 233 (1936). ". . . the fact that periodicals are sold does not put them beyond the protection of the First Amendment" Breard v. Alexandria, 341 U.S. 622, 642 (1951). "It is of course no matter that the dissemination takes place under commercial auspices." Smith v. California, 361 U.S. 147, 150 (1959). Thus, the fact that WDKD's programs are sponsored or paid for by "spots" does not remove them from the aegis of the First Amendment.

And any thought that radio or television may be treated differently from newspapers, because many programs are broadcast essentially for entertainment was rejected in Winters v. New York, 333 U.S. 507 (1948), where the Supreme Court said (p. 510):

> . . . We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right.

> Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.

When Congress, in the exercise of its undoubted power to regulate the use of the radio spectrum, set up the Federal Communications Commission, "it prescribed licensing as the method of regulation." Regents of Georgia v. Carroll, 338 U.S. 586, 598 (1950). With the invention of movable type and resulting growth of newspapers, this too was the method initially used by the English Crown and by Parliament to regulate the press. Realizing the censorship dangers inherent in a "licensing system," such laws were abolished in England after a century-long struggle, and the lessons there learned (among others) were embodied in the free speech and press guarantees of the First Amendment. See Grossjean v. American Press Co., 297 U.S. 233 (1936).

Because of the interference considerations inherent in electronic journalism, and the mutually exclusive character of multiple demands for the same facilities, a licensing system in the radio field appears unavoidable. But it does not follow, from the mere fact that a license is required, that the basic guarantees of the First Amendment place no restrictions on the exercise by a governmental agency of its licensing functions. National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). To so argue would mean that lawyers, doctors, engineers, and accountants could not claim the safeguards embodied in the First and Fourteenth Amendments, because they too must be "licensed" in order to practice their professions. Hence, the fact that a "license", "permit", or "franchise" is required does not mean that governmental agencies can lay down any and all conditions that whim or caprice might dictate. Nor does the fact that the airwaves are publicly owned, any more than the fact that streets, highways, parks, and the postal system are publicly owned, render inapplicable the guarantees of the First Amendment. Lovell v. Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1939); Kunz v. New York, 340 U.S. 290 (1951); Hannegan v. Esquire, 327 U.S. 146 (1946).

In establishing a licensing system for the regulation of the radio spectrum, Congress has made "public interest, convenience, and necessity" the touchstone for determining whether a license should issue. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). The factors normally cognizable by the Commission under such a standard are admittedly broad and multifarious. See Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 349, 258 F.2d 440 (1958). But the standard of "public interest" does not give the Commission carte blanche authority to prescribe any and all tests which it may deem meet. As noted by the Supreme Court, it does "not authorize the Commission to choose among applicants upon the basis of their political, economic, or social views, or upon any other capricious basis." National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). To so construe the statutory standard laid down by Congress would be "delegation run riot." See Federal Radio Commission v. Nelson Bros., 289 U.S. 266, 285 (1933).

What is more, to construe the "public interest" standard as authorizing the Commission to impose its own program views and tastes on broadcast licensees, would contravene (as we now propose to demonstrate) not only the First Amendment but also the "no censorship" provisions of the Communications Act, where Congress expressly provided (47 U.S.C. Sec. 326):

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. [1]

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[1] The legislative history of Section 19 of the Radio Act of 1927, the identical predecessor of Section 326 of the Communications Act of 1934, shows that "the Commission [is] not . . . permitted to exercise the power of censorship over radio programs." S. Rept. No. 772, 69th Cong. 1st Sess. 4 (1926); 67 Cong. Rec. 5480 (1926). Subsequent amendments to the 1934 Act have not altered the above-quoted provisions of Section 326. See 97 Cong. Rec. 960-961 (1951). In fact, as noted by Justice Roberts in Federal Communications Commission v. Saunders Bros., 309 U.S. 470, 475 (1940), the "Commission is given no supervisory control of the programs, of business management or of policy."

B. Previous and Subsequent Restraints. -- Though the First Amendment is phrased in terms of absolutes, it is of course well established that the liberty of speech and press there guaranteed is not unlimited. Near v. Minnesota, 283 U.S. 697, 716 (1931); Roth v. United States, 354 U.S. 476 (1957). Whatever be the scope of the regulatory powers of government where free speech is involved, its authority differs somewhat depending on whether a "previous restraint" or a "subsequent penalty" is involved. Near v. Minnesota, 283 U.S. 697 (1931); Kunz v. New York, 340 U.S. 290, 294, 295 (1951).

Although liberty of the press, historically considered and taken up by the Federal Constitution, has meant principally immunity from previous restraints or censorship, the guarantees of the First Amendment are not aimed exclusively at previous restraints but also proscribe in some degree subsequent punishment or penalties. Near v. Minnesota, 283 U.S. 697, 716 (1931).

While previous restraints have been deemed particularly abhorrent, on the premise that free institutions are better safeguarded by subsequent punishment of wrongdoers under criminal laws against libel and slander, against obscenity, against false and fraudulent representation, against violence, etc. than by previous restraints on publication, the guarantees of the First Amendment would be an empty shell if the Government were free to punish any and all statements which are printed or disseminated. Cf. Near v. Minnesota, 283 U.S. 697, 716 (1931); Grossjean v. American Press Co., 297 U.S. 233 (1936). " . . . the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, Constitutional Limitations, 8th ed., p. 885. This distinction is well illustrated by Kingsley Corp. v. New York, 360 U.S. 684 (1959) where the Court said (p. 689): "Advocacy of conduct proscribed by law [adultery] is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there

is nothing to indicate that the advocacy would be immediately acted on'."

Moreover, with respect to previous restraints, one point is patently clear. While the guarantees of the First Amendment against previous restraint are not absolute, the Court has zealously confined such restraints to "exceptional cases," such as publications in time of war which would be a hindrance to the national effort, or obscene publications, or publications inciting to acts of violence and overthrow by force of orderly government. Near v. Minnesota, 283 U.S. 697 (1931). Legislative regulations tending to abridge free speech and press by previous restraints "must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions." United States v. CIO, 335 U.S. 106, 140 (1948). Prior restrictions on free speech and press are the exception, and such an exception "is to be closely confined so as to preclude what fairly may be deemed licensing or censorship." Kingsley Books v. Brown, 354 U.S. 436, 441 (1957).

In short, "the vice of censorship through licensing and, more generally, the particular evil of previous restraint on the right of free speech have many times been recognized when this Court has carefully distinguished between laws establishing sundry systems of previous restraint on the right of free speech and penal laws imposing subsequent punishment on utterances and activities not within the ambit of the First Amendment's protection." Times Film Corp. v. Chicago, 365 U.S. 43, 53 (1961) (per Warren, C.J., Black, Douglas and Brennan, JJ. dissenting); see Near v. Minnesota, 283 U.S. 697, 718, 719 (1931); Schneider v. State, 308 U.S. 147, 164 (1939); Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); Niemotka v. Maryland, 340 U.S. 268, 282 (1951) (concurring opinion); Kunz v. New York, 340 U.S. 290, 294, 295 (1951).

C. **Administrative Licensing.** -- Licensing is the classic method of previous censorship and restraint. Any law requiring a prior license or permit, and providing a penalty for operating without such a license or permit, as does the Communications Act, is a form of previous restraint.

As noted by the Supreme Court, in reversing a conviction for speaking in public without a permit in Kunz v. New York, 340 U.S. 290 (1951), where the defendant's permit had been revoked because he had previously ridiculed and denounced other religious beliefs (p. 293):

> We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

Where, as here, the Commission has resorted to the "drastic administrative action" of refusing to renew a license (R. 1425, para. 23), because of the content of particular matter broadcast, such action certainly operates as a prior restraint on existing broadcasters who must put their licenses on the line every three years. Furthermore, as the decisions cited under the preceding heading make clear, "prior restraint" cannot "serve as a talismanic test" inasmuch as subsequent punishment in the form of a "death sentence" for a valuable operation may have as great or greater inhibitory effect on free speech than many so-called prior restraints. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441-442 (1957).

In any event, whether viewed as a prior restraint or as subsequent penalty, punishment, or deterrent, the Supreme Court has taken a particularly dim view of censorship by administrative agencies through the exercise of their licensing functions -- for a number of reasons:

1. To begin with, as four eminent jurists stated in Times Film Corp. v. Chicago, 365 U.S. 43, 68 (1961), and on this point their brethren did not disagree,[1] the censor (or licensor) "performs free from all the

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[1] There is reason to believe, with recent changes in the Court, that these four Justices (Warren, C.J., Black, Douglas and Brennan, JJ.) would be joined by at least one of the more recent appointees to the Supreme Court, as evidenced by Justice Goldberg's concurrence without comment in Justice Brennan's opinion in Bantam Books, Inc. v. Sullivan, 31 Law Week 4192 (U.S. Sup. Ct. 1963), containing an almost identical pronouncement.

procedural safeguards afforded litigants in a court of law [indictment or presentment, trial by jury, presumption of innocence, unanimous verdict in a federal court, etc.] . . . The likelihood of a fair and impartial trial disappears when the censor [or licensor] is both prosecutor and judge." See Bantam Books, Inc. v. Sullivan, 31 Law Week 4192, 4194-4196 (U.S. Sup. Ct. 1963).

2. Another evil of administrative censorship, as Justice Douglas noted in his separate dissent (concurred in by Warren, C.J. and Black, J.) in Times Film Corp. v. Chicago, supra, pp. 82-84:

> . . . is the ease with which the censor can erode liberty of expression. One stroke of the pen is all that is needed.[1] Under a censor's regime the weights are cast against freedom. If, however, government must proceed against an illegal publication in a prosecution, then the advantages are on the other side. All the protections of the Bill of Rights come into play. The presumption of innocence, the right to jury trial, proof of guilt beyond a reasonable doubt -- these become barriers in the path of officials who want to impose their standard of morality on the author or producer. The advantage a censor enjoys while working as a supreme bureaucracy disappears. The public trial to which a person is entitled who violates the law gives a hearing on the merits, airs the grievance, and brings the community judgment to bear upon it.[2] If a court sits in review of a censor's ruling, its function is limited. There is leeway left the censor, who like any agency and its expertise, is given a presumption of being correct. That advantage disappears when the government must wait until a publication is made and then prove its case in the accepted manner before a jury in a public trial. . . .

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[1] Cf. Speiser v. Randall, 357 U.S. 513, 526 (1958) where the Supreme Court similarly observed that a "man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer [wide] of the unlawful zone." It is little wonder, therefore, that the Commission has been able to make its programming views felt by "informal adjustment", the net result of which "has been regulation of programming by raised eyebrow." Note, 23 U. of Pitt. L. Rev. 157, 170 (1961). The same ends have also been accomplished by speeches of individual Commissioners. Note, 23 U. of Pitt. L. Rev. 993, 996 (1962).

[2] As the Court will recall, the Examiner was much impressed by the "formidable expression of community support for retention" by Robinson of his license (R. 923, Concl. 23), a fact to which the Commission itself apparently gave little or no weight.

3. Moreover, as stated by Justice Cardozo in Cantwell v. Connecticut, 310 U.S. 296, 306 (1940), "the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, is inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action."[1] In addition, the "delays in adjudication may well result in irreparable damage, both to the litigants and to the public." Times Film Corp. v. Chicago, 365 U.S. 43, 73 (1961).

4. Finally, and this is a point we cannot emphasize too strongly, an administrative agency generally operates under standards or tests which are necessarily broad, and to that extent "vague" and "indefinite." While Congress when it creates a licensing authority may lay down broad guides which the Courts will sustain against a broadside challenge of vagueness, the cases make it clear that "stricter standards of permissible statutory vagueness may be applied to a statute having a particularly inhibiting effect on speech." Smith v. California, 361 U.S. 147, 151 (1959); Winters v. New York, 333 U.S. 507 (1948); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). As Justice Brennan stated for a unanimous court (with three separate concurrences) in Smith v. California, supra, pp. 150-151:

> Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.[2]

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[1] Thus it is no answer for the Commission to say, if it delves too far into program content in the exercise of its licensing functions, that a judicial remedy is available to him who has been wrongfully denied a license.

[2] Compare dissenting opinion of Justice Douglas in United States v. International Union, 352 U.S. 567, 596 (1957): "When the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistence is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control."

Thus, the mere fact that the broad standard of "public interest, convenience, and necessity" has been sustained in situations such as where the Federal Communications Commission has denied licenses on interference grounds, it does not necessarily follow that this standard, which must be read in pari materia with the "no censorship" provisions of Section 326 of the same statute, is sufficiently precise were the Commission to attempt thereunder to deny licenses because of "overcommercialization," "not enough public service programming," "too many Westerns," "too much shooting," or "not enough religion." If these matters are current evils of such moment that a majority of the Supreme Court would sustain a "narrowly drawn" Congressional enactment in this field, it seems patent that the present touchstone of "public interest" is far too broad to warrant the adoption of administrative rules or policies along these lines.

Pertinent decisions of the Supreme Court, particularly those of the last 25 years where personal liberties guaranteed by the Bill of Rights have come to the fore, so indicate. Laws and ordinances allowing an official to deny a permit or license where in his opinion such refusal will prevent "riots, disturbances, or disorderly conduct," have been stricken down, because such a test, as Justice Reed speaking for the Court stated, can "be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities." Hague v. CIO, 307 U.S. 496, 516 (1939). So have ordinances which have allowed a police official to deny a permit to use the public streets to a canvasser "who is not of good character, or in canvassing for a project not free from fraud." Schneider v. State, 308 U.S. 147, 163-164 (1939).[1] An ordinance forbidding solicitation

[1] The Supreme Court said of that ordinance: "It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the 'project' he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion."

unless the secretary of public welfare determined that the cause was a religious one or a bona fide object of charity or philanthropy and conformed to reasonable standards of efficiency and integrity was invalidated in Cantwell v. Connecticut, 310 U.S. 296, 305 (1940).[1]

Likewise, in condemning an ordinance which conferred on the Mayor and City Council the right to "consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effect upon the general welfare of the citizens of the City of Baxley," language suggestive of that in the Communications Act, the Supreme Court said "that the ordinance is invalid on its face because it makes enjoyment of the constitutionally guaranteed freedom of speech contingent upon the will of the Mayor and Council of the City and thereby constitutes a prior restraint upon, and abridges, that freedom." Staub v. Baxley, 355 U.S. 313, 321 (1958).[2]

D. **Program Content.** -- Still more directly in point are recent pronouncements of the Supreme Court rejecting any examination by administrative agencies into "program content." Where administrative agencies, be they federal or state, in the exercise of their licensing functions, "judge the content of the words and pictures to be communicated," the safeguards of the First and Fourteenth Amendments become applicable save in the exceptional case. Joseph Burstyn, Inc. v. Wilson, 343 U.S.

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[1] In commenting on the standard there laid down, the Supreme Court said: "If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means to determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."

[2] Each of those cases, striking down ordinances requiring a permit or license to use the streets, parks, and other government property negates any theory that because the airwaves are "public property" the federal government can impose conditions on the use thereof which but for that fact would contravene the First Amendment.

495, 503 (1952). There, though observing that a state might censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films, the Supreme Court deemed the standard "sacrilegious" prescribed by a New York statute insufficiently specific to allow intrusion into First Amendment areas for purpose of motion picture censorship. There the Court said (p. 503):

> But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.
>
> The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. The Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. Near v. Minnesota, 283 U.S. 697, 75 L ed 1357, 51 S Ct 625 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.'

A violation of the First Amendment arises where a government agency "undertakes to censor the contents of the broadcasting." Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J. concurring). As the Supreme Court has had occasion to note, "any examination of thought or expression in order to prevent publication of 'objectionable material" is censorship. Farmers Union v. WDAY, Inc., 360 U.S. 525, 527 (1960) (emphasis by the Court). No fewer than four Justices of the present Supreme Court are on record, a point on which there was no disagreement, that its prior decisions sustaining restrictions on freedom of speech and

press, whether by licensing or other methods, "do not deal with the content of the speech; they deal only with the conditions surrounding its delivery." Times Film Corp. v. Chicago, 365 U.S. 43, 78 (1961) (dissenting opinion by Warren, C.J., Black, Douglas, and Brennan, JJ., with emphasis in the original).[1]

Thus, the moment the Commission looks at the content of the programs broadcast by a radio or television station, to determine whether a license should or should not issue and whether the operation (present or proposed) is in the "public interest," the Commission is approaching, if not overstepping, the limitations on agency action imposed by the First Amendment, and reaffirmed in Section 326 of the Communications Act.

No fewer than three Justices of the Court (Warren, C.J., Douglas and Black, JJ.) have made it clear that "as long as the First Amendment survives, the censor [licensor], no matter how respectable his cause, cannot have the support of government. It is not for the government to pick and choose according to the standards of any religious, political or philosophical group. It is not permissible . . . for government to release one movie [license one radio station?] and refuse to release [license] another because of an official's concept of the prevailing need or the public good." Times Film Corp. v. Chicago, 365 U.S. 43, 81 (1961) (Douglas J. with whom Warren, C.J., and Black, J. concurred).

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[1] In the light of this pronouncement by four present members of the Supreme Court and Justice Goldberg's subsequent concurrence without comment in Justice Brennan's opinion in Bantam Books, Inc. v. Sullivan, 31 Law Week 4192 (1963), two early decisions of this Court, where the Court permitted the Commission to delve into program content, and on which the Commission here relied (R. 1423, para. 20), are of doubtful validity, and in any event distinguishable. KFKB Broadcasting Ass'n v. Federal Radio Commission, 60 App. D.C. 79, 47 F.2d 670 (1931); Trinity Methodist Church, South v. Federal Radio Commission, 61 App. D.C. 311, 62 F.2d 850 (1932), cert. den. 284 U.S. 685 (1932), 288 U.S. 599 (1933). The KFKB case not only antedates Near v. Minnesota, but was based on the giving of medical advice and the advertising over the air of licensee's patent medicines, "advertising practices" found to be "inimical to the public health and safety." In the Trinity case, where the Commission refused to renew because of certain speeches the owner had made over his station, it is not without significance that some of those speeches had already been judicially determined to be in contempt of court, with the Commission thus not acting as both prosecutor and judge. In re Shuler, 210 Cal. 377, 402, 292 Pac. 481, 492 (1930).

Thus, if broadcasting tastes and standards are to be elevated, the reformation must be effected by the licensees and by the listening and viewing public, and not by the whip hand of government. Hannegan v. Esquire, 327 U.S. 146 (1946). There a unanimous court said (p. 157):

> Under our system of government, there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another . . . But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.

And as stated in dissent in Times Film Corp. v. Chicago, 365 U.S. 43, 84 (1961):

> The First Amendment was designed to enlarge, not to limit, freedom in literature and in the arts as well as in politics, economics, law, and other fields. . . . Its aim was to unlock all ideas for argument, debate, and dissemination. No more potent force in defeat of that freedom could be designed than censorship. It is a weapon that no minority or majority group, acting through government, should be allowed to wield over any of us . . . .

E. Issues 3 and 4. -- The Commission's examination into WDKD's programming (particularly in connection with Issues 3 and 4) does not square with the foregoing pronouncements of the Supreme Court dating from the landmark case of Near v. Minnesota (1931). Here, under Issue 3, the Commission most certainly delved into program content, by concluding that certain of the material on Walker's programs was "coarse, vulgar, suggestive and of indecent double meaning," "and thus contrary to the public interest" (R. 1424-1425, paras. 22-23). While it is well established that "obscenity is not within the area of constitutionally protected speech or press," Bantam Books, Inc. v. Sullivan, 31 Law Week 4192, 4194 (U.S. Sup. Ct. 1963), the Commission cannot defend its instant action on any such basis. Unlike its Examiner, the Commission went to

great lengths to deny that the words it used in Issue 3 are to be equated with "obscenity" as used in 18 U.S.C. Sec. 1464 (R. 1422, para. 19).[1]

While obscenity is not protected by the First Amendment, utterances short of "obscenity" are, and Walker's broadcasts, in view of the Commission's action disavowing the Examiner's attempt to equate the one with the other, must be deemed something less than "obscene". Even salacious publications without "any possible value to society . . . are as much entitled to the protection of free speech as the best of literature." Winters v. New York, 333 U.S. 507, 510 (1948). Furthermore, with the dividing line between obscenity and something less than obscenity "dim and uncertain," with the latter protected and the former not by the First Amendment, the line between the two, as the Supreme Court has had occasion to note, must be drawn under the "most rigorous procedural safeguards," including (as Mr. Justice Douglas stated in his concurring opinion) "all the procedural safeguards of the Bill of Rights, including trial by jury." Bantam Books, Inc. v. Sullivan, 31 Law Week 4192, 4194, 4196 (U.S. Sup. Ct. 1963).

In the instant porceeding the Commission and its staff were the investigators, the prosecutors, the judge and the jury in passing on the character of the material here found objectionable, a setup which (as we have seen) a majority of the present Supreme Court has criticized in no uncertain language where basic constitutional freedoms are involved. Here, the safeguards of the Bill of Rights -- the presumption of innocence, the right to jury trial, proof of guilt beyond a reasonable doubt -- are scuttled by a supreme bureaucracy applying its views of morality and taste under a broad "public interest" standard. In this case, the Commission's asserted power, exercised in a non-comparative renewal proceeding, lacked the substantive and procedural safeguards which guarantees First Amendment rights. See Manual Enterprises, Inc. v.

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1 Section 1464 also prohibits the broadcasting of "indecent" language, a term which has been construed as synonymous with "obscene", and does not therefore include language commonly thought of as "coarse" or "vulgar". Duncan v. United States, 48 F.2d 128, 132 (C.A. 9, 1931), cert. den. 283 U.S. 863 (1931).

Day, 370 U.S. 478, 495-519 (1962) (concurring opinion of Brennan, J.). Here, being a renewal case, the licensee had both the initial burden of producing evidence and the burden of proof (47 U.S.C. Sec. 309(e)). In a prosecution for obscenity under the Criminal Code, that burden would have been on the government (18 U.S.C. Sec. 1464).[1] And the same is true had this been a revocation proceeding (47 U.S.C. Sec. 312(d)).

The Commission's disavowal (R. 1424-1425, para. 22) of any intention to embark into a "sensitive area," its assertion that it has always acted "with great circumspection" in this field, and its view that such delving into program content (short of obscenity) poses no "danger to free expression in the broadcasting field" affords small comfort to students of history -- familiar with how initial inroads into basic liberties have always begun with similar disavowals by persons in power. We much prefer to rely on written guarantees embodied in the Bill of Rights, safeguarded by a judiciary alert to what follows once a breach, no matter how small, is condoned.[2]

Though to some members of this Court, certain of the material included in FCC Exhibit 2 (see R. 890-895) will no doubt be viewed as highly offensive, a refusal by the present Commission or a successor Commission to renew a license on that score, under a broad "public interest" standard, is only one step removed, and a very short one at that, from action denying a renewal because of too many "commercials", not enough "agriculture", "too many Westerns", or "too much shooting". If the one action is permissible, so is the other.

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[1] That the Government has not been anxious here to assume that burden is quite apparent. For the Court's information, at the time of the instant hearing in 1961, Walker had already been indicted under the obscenity statute (18 U.S.C. Sec. 1464). His trial has since been postponed, on the latest occasion at the Government's request, to December 1963.

[2] That a subsequent Commission may well forget commitments of its predecessors is attested to by contrasting the action here taken and the following statement in the Commission's 1949 Report on Editorializing (1 RR Pt. 3, 91:201, 211): ". . . the most significant meaning of freedom of radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear . . ."

In fact, that second step has already been taken by the Commission in this very case in connection with Issue 4. There the Commission complains of "overcommercialization", not enough "programs for children", not enough "public affairs" programming, no "editorialization", skimpy "news programs" (see R. 919-920, Concls. 14 and 15; R. 1425-1426, para. 24), even though the Examiner who heard and analyzed the evidence frankly admitted that WDKD's programming (except for the "obscenity" aspects) was not much different from that of other similarly situated stations (R. 920, Concl. 15).

To make matters worse, although the Commission has a rule-making proceeding pending (Docket No. 13961)[1] which would require licensees to report on the fourteen categories listed in its 1960 Program Policy Statement (20 RR 1901), against which the Examiner filled out WDKD's "report card" (R. 919-920, Concl. 14), the Commission's existing renewal forms are still limited to seven categories (R. 9-104), in only one of which did WDKD turn up with a "goose egg" (R. 14; Tr. 766). Nowhere to date has the Commission indicated what it deems a percentage "norm" for these several categories, either in its present or proposed program forms, and in fact has recognized that stations may "specialize" in one or more program areas. Nor has the Commission to date issued any fiat that stations must editorialize.

Similarly, although the Commission in recent weeks has instituted a rule-making proceeding looking toward specifying the permissible amount of commercial continuity (Docket No. 15083), by proposing to adopt the standards set out in the NAB (non-governmental) code, no specific standards on that subject have been adopted by the Commission to date. Even the NAB Radio Code has no explicit limitations on length or number of "spots." It permits up to 18 minutes of commercial continuity per hour, which would mean that a station could broadcast as many as nine 30-second spots per quarter hour (see Tr. 200) and a still greater

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1 See Pike & Fischer, Radio Regulation, "Current Service", Vol. 3, pp. 98:21, 25, et seq.

number of shorter spots) per quarter hour (Tr. 645) -- far more than the number usually broadcast by WDKD.

Ironically enough, in its rule-making notice in Docket No. 15083 (FCC 63-647), the Commission recognizes that the NAB Code may not be appropriate for across-the-board application and that more liberal standards may be needed for daytime only stations, for those in sparsely populated areas, and those in communities with seasonal economy (para. 7) -- the very factors which account for the large (but not inordinate) number of spots shown on particular days and during particular seasons by a station (WDKD) limited to daytime hours, considerations which the Commission in this case largely ignores (cf. R. 898, Fdg. 44). And the Examiner's snide reference to "inexpensive" rates for local merchants (R. 923, Concl. 23) with an innuendo that if the rates were upped the number of spots would come down, overlooks a highly important consideration: As noted in our Statement of the Case WDKD is a wide-coverage station (5 kw) and serves almost a dozen very small towns in its service area (Tr. 358-359). Merchants in each of those towns are interested in only a small part of WDKD's wide coverage. Therefore, to be of use to those merchants, WDKD must keep its rates down and not make them pay for coverage in which they are not interested. This, of course, toward the weekends and during seasonal periods, naturally produces a flood of spot requests (see Tr. 177-178, 250-251). WDKD would not be serving those advertisers (and the public interested therein) if it were to price itself out of business and refuse to carry "help wanted", "farm auction", "trading post", "shopper guide" and like programs expressly exempt by the NAB Code from the 14-18 minutes per hour there specified (Tr. 131).

Thus, we have here the shocking situation of an agency claiming authority not only to proceed under a broad "public interest" standard, in a field which can have a particularly inhibiting effect on free speech, but also the right to deny license applications on the basis of broad policy statements which lay down no specific or ascertainable norms, in a

proceeding in which it was the investigator, prosecutor, judge, and jury.

Thus, we submit that it is not asking too much, in situations where the action of an administrative agency can have a particularly inhibiting effect on speech, to insist on "stricter standards of permissible statutory vagueness" than the "public interest" standard laid down in the Communications Act. The decisions of the Supreme Court furnish examples of standards, "in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression." Smith v. California, 361 U.S. 147, 150-151 (1959). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 31 Law Week 4063, 4067 (1963) (U.S. Sup. Ct.). Or as well stated by Justice Douglas, in dissent, "Where the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistence is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control." United States v. International Union, 352 U.S. 567, 596 (1957).[1]

To date Congress has refused to delegate to the Commission express authority to control programming so as to eliminate specific evils which may be within the reach of its broad powers, e.g., H.R. 3543, 82nd Cong., 1st Sess. (1951); H.R. 5471, 84th Cong., 1st Sess. (1955); H.R. 9549, 86th Cong., 2d Sess. (1960). As stated by former Chairman Ford in 1960: "Thus far Congress has not imposed by law an affirmative programing requirement on broadcast licensees." Hearings on S. 3171 before the Communications Subcommittee on Interstate and Foreign Commerce, 86th Cong. 2d Sess. 48 (1960). In the absence of "narrowly drawn" legislation, directed to a particular evil in such fasion as not to abridge

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[1] See Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 1055 (1962).

First Amendment guarantees, the Commission may not impose its personal programming tastes on broadcast licensees under a broad standard of "public interest" and in the face of express statutory and constitutional prohibitions against censorship. With Congress having expressly denied to the Commission any power of censorship (47 U.S.C. Sec. 326), and with the Supreme Court insisting on narrowly drawn statutes where First Amendment rights are involved, it is not to be lightly inferred that Congress did or that it intended to confer on the Commission the power to examine into program content non-comparatively under the vague standard of "public interest". Kent v. Dulles, 357 U.S. 116, 130 (1958); Hannegan v. Esquire, Inc., 327 U.S. 146, 151, 156 (1946).

For this Court to hold that the Commission may not under the broad "public interest" standard examine into program content in non-competitive renewal proceedings, will not leave that agency powerless nor the public unprotected. The Commission has other sanctions at its command, under the statute as presently written, the employment of which would not make it both the "prosecutor and judge":

For example, the Commission has authority to apply to the Attorney General, alleging a failure to comply with or a violation of any provision of the Communications Act, whereupon the district courts have jurisdiction, if the facts there adduced so warrant, to issue writs of mandamus commanding compliance (47 U.S.C. Sec. 401(a)). It has like authority to refer to the Attorney General any alleged violations of the obscenity prohibitions of 18 U.S.C. Sec. 1464, and upon a conviction thereof in a federal district court, to revoke a license therefor (47 U.S.C. Sec. 312(a)(6)). It also has authority to issue cease and desist orders (47 U.S.C. Sec. 312(b)) -- with a revocation of a license lying only for a subsequent "violation of or failure to observe any final cease and desist order" (47 U.S.C. 312(a)(5)).[1] It has authority to declare a money

[1] The Court will note that the power to revoke a license is restricted to a proved "violation of section . . . 1464" (47 U.S.C. Sec. 312(a)(6)), while a "cease and desist order" may issue where a person has either "violated or failed to observe" Section 1464 (47 U.S.C. Sec. 312(b)(5)).

forfeiture of $1000 for each day's violation of 18 U.S.C. Sec. 1464 (47 U.S.C. Sec. 503(b)(1(E)), with the person against whom such a fine or forfeiture is assessed entitled to a trial de novo in a federal district court (47 U.S.C. Sec. 504(a)). Recourse to these procedures, unlike the one here used, will not scuttle the entire Bill of Rights.

With the Supreme Court on more than one occasion, as we have seen, stating that it has not condoned, because of the prohibitions of the First Amendment, any delving into program content, and with that Court insisting on a "narrowly drawn" statute where First Amendment rights are entangled with evils which Congress may regulate, it seems clear that the Commission action here challenged impinges on the First Amendment and on 47 U.S.C. Sec. 326 insofar as the refusal to renew was bottomed on an examination into program content under a general "public interest" standard. That the Commission indeed examined into program content in resolving Issues 3 and 4 is scarcely debatable.

F. **Issue 2.** -- The Commission's conclusions under Issue 2 are similarly tainted (R. 1420-1421, paras. 14-16). Though admitting that a short-term renewal would be more meet, if this issue stood alone (R. 1421, para. 16), its conclusion that Robinson did not exercise "the appropriate degree of control and supervision over programing" (R. 1420, para. 14) stems from the naked fact that the licensee allowed material which the Commission found objectionable to go out over the air.

If we be right, as recent Supreme Court pronouncements clearly suggest, that administrative agencies cannot look into program content, at least in the absence of a narrowly drawn statute directed to a particular evil which government may regulate, the First Amendment would be gossamer protection indeed if a government agency, though told that it could not look at program content directly, could immediately turn around and conclude that the licensee exercised inadequate control over the station because program matter which that agency thought objectionable had been broadcast over the station.

In short, the adverse conclusion under Issue 2 is bottomed on the finding that the licensee permitted objectionable material to be broadcast, and ergo that he exercised inadequate control over the station. Thus, the Commission's conclusion under Issue 2 can no more support the action here challenged than can the conclusions which it reached under Issues 3 and 4.[1]

II.

THE COMMISSION'S REFUSAL TO RENEW WDKD'S LICENSE WAS IN OTHER RESPECTS ARBITRARY, CAPRICIOUS, AND CONTRARY TO THE PUBLIC INTEREST

Although the instant hearing arose out of suggestive material allegedly contained in certain of Charlie Walker's broadcasts, and although the Examiner was of the view that the pivotal issue in this case was Issue 3, the Commission sought to "shore up" a refusal to renew WDKD's license by finding that Robinson had not been candid about Walker's broadcasts (Issue 1), and that this fact standing by itself precluded a renewal (R. 1420, 1426, paras. 13 and 25).

Where fundamental guarantees of the Bill of Rights are involved, this Court is no more bound by findings made by an administrative agency that is investigator, prosecutor, judge and jury, than is the Supreme Court by findings of a state court seeking to condone a given result on non-federal grounds, where basic rights of the Federal Constitution are involved. "As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here." Ker v. California, 31 Law Week 4611, 4614 (U.S. Sup.

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[1] An effort by Bureau counsel to test Robinson's control over the station (and also his credibility), by inquiring whether he kept a file of requests for "political time" as required by the Commission's rules backfired abysmally (Tr. 345). Robinson produced the file and presented it to Bureau counsel (Tr. 785), with nothing further heard on that score (Tr. 786). In passing it is not without significance that the Examiner applied a standard of making a licensee responsible for all material broadcast (R. 918, Concl. 11), whereas the fourth "it appearing" clause in the hearing Order (R. 106-107) spoke in terms of a "reasonable degree of control."

Ct. 1963); Spano v. New York, 360 U.S. 315, 316 (1959); Pierre v. Louisiana, 306 U.S. 354, 358 (1939); Blackburn v. Alabama, 361 U.S. 199, 205 fn. 5 (1960).

There are a number of reasons why the Commission's findings and conclusions under Issue 1 cannot stand.

At the outset, the Court should carefully note the highly restrictive wording of Issue 1 as phrased in the hearing Order of March 21, 1961 (R. 107):

> To determine whether in the written and oral statements to the Commission with respect to the above matters [Charlie Walker's broadcasts], the licensee misrepresented facts and/or was lacking in candor. [1]

In other words, in written and oral statements about Charlie Walker's broadcasts which Robinson had already made to the Commission at the time the hearing was ordered (March 21, 1961), did he misrepresent any facts and/or evince a lack of candor? What he may have said on other matters prior to the date of the hearing Order, and what he may have said on all matters at the subsequently held hearing, except insofar as such testimony tends to refute any "written and oral statements" which Robinson made about Charlie Walker's broadcasts prior to the hearing

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[1] The first three "it appearing" paragraphs of the hearing Order bearing on Issue 1 read as follows (R. 106):

> "IT APPEARING, That in the Commission's letter of May 11, 1960, it was brought to said licensee's attention that the Commission had information, including tape recordings, concerning certain program material broadcast by said station, with particular reference to the Charlie Walker programs, and that said broadcast material was allegedly vulgar, suggestive and susceptible of double meanings with possible indecent connotations; and
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> "IT FURTHER APPEARING, That in the licensee's replies and affidavits, said licensee disclaimed knowledge of the nature of the statements broadcast by said Charlie Walker over said radio station and stated further that immediately upon learning of the nature of the statements, said licensee discharged said Charlie Walker; and
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> "IT FURTHER APPEARING, That written and oral statements submitted to the Commission by the licensee with respect to the above matters contained misrepresentations and/or were lacking in candor; . . .

Order, are not in issue.[1]

In view of the restricted wording of Issue 1, it thus becomes important to ascertain precisely what "written and oral statements" Robinson made to the Commission prior to the March 21, 1961 hearing Order, and then to determine whether those statements were less than candid.

The "oral statements" mentioned in the Order can be disposed of in a word. So far as the instant record discloses, the only oral statements which Robinson at any time made to the Commission or its staff prior to the issuance of the hearing Order, were made to a field investigator in August 1960 (Tr. 124-125, 329). With the investigator apparently more interested in talking to other employees at the station, his interview with Robinson was apparently quite brief (Tr. 124, 331). Robinson recalled nothing of particular importance that was there said (Tr. 124-125). And significantly enough the Commission never called its field investigator as a witness to testify to anything different, nor to assert that Robinson made any admissions during that interview inconsistent with his written statements.

Hence, under Issue 1 as worded, any lack of candor or claim of misrepresentation must stem from "written statements" which Robinson made to the Commission about the Walker matter prior to the date the hearing was ordered. The dates and wording of those "written statements" are not in dispute, to wit, the letter of May 20, 1960 by Robinson's attorney (WDKD Ex. 4),[2] Robinson's letter of June 10, 1960 (WDKD Ex. 6), and Robinson's affidavits of June 10, 13, and 22, 1960 (WDKD Exs. 7, 8 and 9) (see R. 212, 215-218).

What facts, statements, or assertions are contained in those particular documents which give rise to any claim of misrepresentation or

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1 Congress has expressly provided that where a hearing is ordered on a given application the Commission shall specify "with particularity the matters or things in issue but not including issues or requirements phrased generally" (47 U.S.C. Sec. 309(e)).

2 Strictly speaking, for reasons hereinafter stated, the May 20, 1960 letter should not be included.

lack of candor on Robinson's part? The Commission seems to place considerable reliance on a statement made by Robinson's attorney in a letter of May 20, formally demanding permission to hear the tapes which the Commission had mentioned in its letter of May 11, 1960 so that the matter there raised could be investigated and a reply prepared (see R. 1418, para. 9).

As brought out in our Statement of the Case, the Commission's May 11 letter had forewarned the licensee that the Commission was in possession of certain tapes of Charlie Walker's broadcasts which were allegedly "vulgar and suggestive", without however, providing any information about dates or source (WDKD Ex. 3, R. 211). Upon receipt of this letter Robinson called Walker into his office (Tr. 142). He (Walker) denied knowledge of broadcasting anything which might fall in the category of vulgarity or suggestiveness (see Tr. 142, R. 212).[1] Robinson next got in touch with his Washington attorney (see R. 212). The latter then informally asked the Commission's staff for permission to hear the tapes (see R. 212). This request was refused (R. 212).[2]

Walker's attorney, in view of the 15-day limitation specified in the May 11 letter, thereupon traversed the allegations of that letter, so as to

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[1] It is not without significance that Walker himself was never called as a witness by either side in this proceeding, and that Robinson's statements concerning Walker's denials are thus nowhere contradicted.

[2] This "cop and robber" approach by an administrative agency highlights the wisdom of the Supreme Court's concern over scuttling other facets of the Bill of Rights in free speech situations (see R. 3-15). If this were either a civil or criminal proceeding governed by Federal Rules, such material would have been available to Robinson's attorney as a matter of course, along with the names of principal witnesses (but see R. 33, 47). Here, an appeal to the full Commission (R. 108C-108F) had to be resorted to in order to obtain possession of the tapes (cf. R. 177) -- which order was not forthcoming (R. 173-176) until five days before the then scheduled hearing date (R. 108). Although desirous of testing the original tape under an oscilloscope to see whether jokes told at smokers were dubbed in between records, the tapes which were thus supplied pursuant to the Commission order were apparently a copy rather than the originals (see R. 80, 83; Tr. 509, 515). The source of the tapes was not disclosed until after appellant's direct case was presented (see Tr. 322; R. 11). The tapes themselves were undated (Tr. 612, 614, 618). No names of witnesses were supplied until they were actually called (see R. 3-15).

lay a foundation for the formal demand to listen to the tapes (see R. 108C-108F). Although Robinson's attorney asserted in his letter of May 20, 1960 that "Station WDKD has no knowledge of having broadcast any 'vulgar or suggestive' programs," it is clear from an ensuing paragraph of the letter that this was done in order to have an opportunity to hear the tapes, to conduct a careful investigation into the matter, and thus "in order for a reply to be made" to the May 11 letter (R. 112).[1]

On June 8 the foregoing request was honored by the Bureau to the extent of permitting appellant's attorney to listen to excerpts from some of the tapes, and to make notes thereon, though the Bureau persisted in its refusal to divulge the source of the tapes or their approximate dates. Eight items thus heard were reported to Robinson by his attorney (R. 213-214). Two days thereafter, in reply to the May 11 inquiry, appellant advised the Commission by letter of June 10 that he had been supplied by his attorney with "several quotations from the taped shows," that "those statements" by Walker were not known to appellant, that he could "not help but agree that they are suggestive and, in some cases, of a vulgar nature," that he was not "acquainted with the nature of the statements made by Charlie Walker," that he had immediately fired Walker, and that he had taken steps to prevent any recurrences (WDKD Ex. 6, R. 215, Tr. 147-148). These actions were further confirmed by supplementary affidavits of June 10, 13 and 22 (R. 216-218).

No fair reading of the attorney's letter of May 20, and the actual reply by Robinson of June 10 (and the three related affidavits), stemming from the Commission's letter of May 11, bearing in mind the disclosure there made that the Commission was already in possession of certain

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[1] In any event, the attorney's letter of May 20, 1960 should not have been considered. Promptly after the release of the hearing Order on March 21, 1961, appellant's attorney filed a pleading requesting that the "written and oral statements" referred to in Issue 1 be identified by date, by substance, and by whom and to whom made (R. 108K-108N). By a Memorandum Opinion and Order released May 4, 1961, appellant was told that the written statements were Robinson's letter of June 10 and his affidavits of June 10, 13 and 22, with no mention made of his attorney's letter of May 20, 1960 (R. 174, para. 7). See also the second paragraph of the hearing Order of March 21, 1961 (R. 106).

tapes, supports any conclusion that by these communications Robinson was attempting to mislead the Commission, or that the Commission was in fact in any way misled -- absent subsequent transcript proof that Robinson did in fact know that Walker had broadcast those particular items (or others equally objectionable) over WDKD.[1]

Turning to the transcript itself, if one reads the instant record, bearing in mind that Robinson did not deem the various punning or assonant epithets which Walker applied to nearby towns to be "vulgar or suggestive" (e.g., Greeleyville as Greasy Thrill, Bloomville as Bloomersville, St. Stephens as St. Step-ins, Monck's Corner as Monkey's Corner, Georgetown as Stinkumville, etc.), whereas the Commission and its staff thought otherwise, there is (we submit) no significant conflict between Robinson's testimony and that of other witnesses (see Tr. 138, 209-211, 215). These epithets, as the record shows, were not of Walker's coinage and were in common use in the Kingstree area (R. 313-314, 541-542). It is quite evident that Robinson did not regard these references to various towns as "coarse or vulgar," though he was aware that they might offend, for quite a different reason, sponsors or residents of those particular towns (Tr. 209-212, 215, 223, 225, 233, 311-313, 326). The Commission and some of its witnesses, on the other hand, deemed these appellations to be suggestive, double entendre, etc. (Tr. 521-522).

Thus, Robinson's admission at the hearing that he was aware of Walker's badinage about names of towns in the area (Tr. 230-232), Walker's references to himself as "Banana Nose" (Tr. 314-315), and Walker's kidding of the sponsor and his products (Tr. 215),[2] a matter on which

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1 In thus assuming arguendo that knowledge of other equally objectionable items might suffice, we are giving the Commission the benefit of a claimed, but we submit a non-existent ambiguity. A literal reading of Robinson's letter of June 10 shows it to be confined to the statements (eight items) summarized in his attorney's letter of June 8. (cf. Tr. 146, 150, 153, 214, 322, 326-327).

2 That even an Arthur Godfrey, who made famous the technique of kidding sponsors and their products, occasionally ran into one without a sense of humor is a matter of common knowledge. Though Sears & Roebuck may have objected to his ad lib kidding (Tr. 741-742), the sponsor whom Walker characterized as the only person short enough to milk a cow standing up took no offense (Tr. 446-447; cf. Tr. 155, 209-211, 223, 226, 282).

Robinson had on 8 or 10 occasions over the years remonstrated to Walker (Tr. 138, 224, 315), cannot be construed as a contradiction of the statement in the May 20 letter of his attorney that "Station WDKD has no knowledge of having broadcast any 'vulgar or suggestive' programs," and more particularly as a contradiction of Robinson's statement of June 10 that he had received from his counsel "several quotations from the taped shows," that "these statements made by my employee, Charlie Walker, were not known to me," and that he was not acquainted until he received the quotations from his attorney "of the nature of the statements made by Charlie Walker."

Attempts by the Bureau at the hearing to show actual knowledge of these 8 items or others equally offensive were wholly unsuccessful. It is understandable that a criticism by a minister of Walker programs (Tr. 556), while Robinson was in the hospital and under sedation (Tr. 343), after his serious automobile accident (WDKD Ex. 1, R. 204; Tr. 122, 350), might not have registered completely with him (Tr. 226-227), since various ministers had previously complained about the type of music (rock and roll) played by Walker on a program immediately preceding or following the broadcast of a church service (see Tr. 156, 158-159, 226-227, 561).

And that Robinson, when an only daughter (a victim of multiple sclerosis) was at death's door (Tr. 591), may have thought another minister was complaining on a similar ground would be equally understandable (Tr. 581-582).

Apparently fully realizing that the record nowhere shows that Robinson himself did have actual knowledge of the particular material listed in FCC Exhibit 2 or others of that character (exclusive of the epithets), the Decision below falls back on a contention that FCC Exhibit 2 is typical of all of Walker's broadcasts, during the entire ten-year period he was at the station, and that it is therefore inconceivable that Robinson could have been unaware of their objectionable character. Such assumptions are not borne out by the record.

Walker, as we have seen, had three shows daily on WDKD -- roughly 20 hours per week. The competing station which supplied the material on which the Commission largely relies apparently taped a vast number of Walker's programs broadcast over a period of approximately a year, starting in April 1959 (Tr. 597, 599-600), with the tapes which were actually used covering six broadcasts between October 15, 1959 and April 27, 1960 (Tr. 619-620).[1] Many tapes were admittedly discarded -- apparently as containing nothing offensive (Tr. 599-600). The sum total of material which the Commission deems suggestive as set out in FCC Ex. 2 (and apparently taken from at least six months of tape recordings) would not consume more than 20 or 30 minutes of air time.

Since Walker used on his disc jockey shows a type of music (rock and roll, hillbilly, etc.) designed to appeal particularly to a rural audience (Tr. 542) which was 70% Negro (Tr. 128, 305, 385), a type of music which it is not shown especially interested Robinson, the fact that Robinson might well have missed the particular stories summarized in FCC Ex. 2 would not of course be surprising. That Robinson, with time-consuming duties of his own to perform in connection with the operation of a station functioning with a small staff could not afford the luxury of listening day after day with rapt attention to Walker's broadcasts (two hours in the morning immediately after the station signed on at sunrise, another hour around noon, and an hour shortly before sign-off at sunset) is by no means incredible.[2]

That all of Walker's broadcasts (from 1949-1960) could not have been interspersed with "stories" of the degree of suggestiveness of those shown on six different days in FCC Exhibit 2 is completely belied by other

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[1] Although Issue 3 related to Walker's broadcasts, "particularly during the period between January 1, 1960 and April 30, 1960", it is to be noted that three of the tapes and two of the days on which the material contained in FCC Ex. 2 was allegedly broadcast were in October 1959 (Tr. 619-620).

[2] We know of at least two former Chairmen of the Commission who have had occasion, in speaking to broadcasters in a jocular vein, to assert that the adoption by the Commission of a rule requiring a licensee to sit in front of his radio (or television) set for one solid week would constitute "cruel and unusual punishment" interdicted by the Eighth Amendment.

considerations which the Commission totally ignores. If those stories were typical of Walker's on-the-air broadcasts (20 hours weekly) during the entire period from 1949 to 1960 (with a two-year hiatus while Walker was in the armed services), as the Commission would apparently have us believe, we cannot imagine that church, parent-teacher, and other organizations in Williamsburg County would not have deluged the Commission with complaints long prior to April of 1960. No such complaints were filed and WDKD's license was repeatedly renewed.

Nor would the Commission, for proof of "long duration", have been required to fall back on Robinson's former partner who told the Commission under oath in 1956 that he was disposing of his half interest in WDKD to devote his time to other businesses, and his contradictory sworn testimony in this proceeding that he got out of the station in 1956 because he had "fired" Walker for something he said over the air but that Walker didn't "stay fired." (Tr. 724). Since he got out under a "buy-sell" offer (Tr. 729), he could have gained by complete control by buying rather than selling -- a decision which he has apparently rued.[1]

As admitted by several witnesses which the Bureau itself called, though labeling occasional remarks which Walker made on his programs as "sexy" and "off color", several found nothing more suggestive on his broadcasts than that to be seen or heard on certain current shows on television (Tr. 369, 414; cf. Tr. 419-421, 423, 485) -- testimony which likewise shows rather conclusively that the stories assembled in FCC Exhibit 2 were scarcely typical of Walker's broadcasts from 1949 to 1960.

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[1] Why the Examiner went to the length he did in attempting to ferret out inconsistencies in Robinson's testimony, while giving Few, Green and WJOT a clean bill of health, is indeed curious. That Few's testimony was at odds with his sworn statement in 1956 seems obvious (Tr. 724). Green, though denying at one point that he ever had any supervisory authority at WDKD (Tr. 638), thus casting a cloud on Robinson's contrary assertion, admitted when confronted with written evidence that he had signed letters as "assistant manager" of WDKD (Tr. 651). Though the Chairman of the Williamsburg County Board of Education put the Commission on notice that the Lake City station (WJOT) "have had a good bit of jealousy and have been in my office and quoted things which were untrue" (Tr. 416), the observation apparently went unheeded.

Nor can we imagine, if the material in FCC Exhibit 2 was typical of Walker's broadcasts from 1949-1960, that the two ministers whom the Commission subpoenaed would have testified that it would be a disservice to the community not to renew WDKD's license (Tr. 572, 593-594).

In short, the assumptions that the same degree of suggestiveness prevailed throughout the period Walker was in the employ of WDKD, and that stories comparable to those contained in FCC Exhibit 2 were broadcast day after day between every musical recording -- on which the "must have known" conclusion is predicated -- is not warranted by the record. It is refuted by the Broadcast Bureau's own witnesses, many of whom were able to recall only the assonant epithets (Tr. 521-522, 549), who testified to only an occasional complaint (Tr. 526), and who admittedly never passed even those criticisms on to Robinson (Tr. 527).[1]

In a last desperate effort to support its findings and conclusions under Issue 1, the Commission notes (R. 1420, para. 12), regarding the question of credibility as between Robinson and other witnesses, that the Examiner, who observed the demeanor of the witnesses, stated that he had "no reasonable basis to doubt the veracity of those whose testimony was at odds with that given by Robinson. He does have cause to doubt that on the stand Robinson testified to the whole truth" (R. 921, Concl. 16).

Those observations, wholly unsupported by anything disclosed by the present record, are not binding on this Court. "Demeanor" and "credibility" conclusions, with no supporting evidentiary findings, reached by an agency that is investigator, prosecutor, judge and jury, would furnish an all too easy dodge by which to foreclose judicial review where basic constitutional rights are at issue. There is, we submit, no substantial conflict on matters here at issue, between Robinson and other witnesses, once recognition is given to the fact that Robinson did not deem Walker's

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[1] In line with Robinson's testimony (Tr. 230, 299), a teacher in the Kingstree High School testified he never heard of any complaints (Tr. 371); the Superintendent of Schools recalled no stories -- only punning epithets (Tr. 390-391).

assonant epithets to be coarse and vulgar. Absent basic conflicts in testimony, no issue of credibility arises. And to brand as a "misrepresentation" a denial of any "obscenity" or "coarse and vulgar" programs being broadcast, where no two people would necessarily agree on what those words mean, is indeed "reaching" in an effort to justify a predetermined result.

The Examiner's assertion (R. 921, Concl. 16) that Robinson's testimony, as digested in the Examiner's findings, is "often marked by vagueness and ambivalence; a poor earnest of probity," completely overlooks other matters here apparent. An uncontradicted medical affidavit, plus testimony (Tr. 350), shows that Robinson was in a serious automobile accident in November 1957, that he was hospitalized for more than three months and confined to his home another six months, and that this accident had left Robinson with a "partial deafness of the left ear" (WDKD Ex. 1, R. 204). Throughout the hearing it is quite evident that Robinson had difficulty hearing (Tr. 123, 126, 127, 170, 204-205, 231, 238, 292, 296, 335, 339; cf. Tr. 764). With the hearing held in a building on the main street of Kingstree in early June (R. 195) with the building apparently not air-conditioned and the windows open (Tr. 717, 764), the transcript further shows that the proceeding was interrupted on several occasions by noise emanating from outside sources (Tr. 417, 425). Anyone with trial experience, or who has had a cold "settle in his ears," knows that a witness who misses or misunderstands a key word or two in questions propounded to him, can give the impression of "vagueness" or even "ambivalence", no matter how honest he be.

Although thus questioning, and we think quite unjustly, Robinson's testimony with respect to Walker's broadcasts, it is not without significance that it was not the Examiner's judgment that Robinson "is a venal man of evil purpose or that he is a congenital liar" (R. 923, Concl. 22). In fact on most matters he found that Robinson's candor "is no different than others" (R. 923, Concl. 22). Likewise, in the Examiner's view, there is "no blinking of the fact that Robinson did marshal a formidable expression of community support for retention of his station's license" (R. 923,

Concl. 23). And with Robinson having learned his lesson, the Examiner was confident that he had sufficient character to be hereafter entrusted with a license, with no danger of any recurrence of the matters he here found to be objectionable (R. 923, Concl. 22).

Thus, we submit that the Commission's studied effort to bolster its questionable foray into program content, by seeking to justify its conclusions on an allegedly (but not in fact) independent ground is not adequately supported by the record. To impose the "death sentence" on the grounds of "misrepresentation," where the "conclusions" on that score are as questionable as they are here, and where the whole record is tied into the "obscenity" issue, would be wholly arbitrary and capricious, and utterly shocking.

From the time of its establishment in 1934 the Federal Communications Commission (unlike its predecessor, the Federal Radio Commission) had never revoked or refused to renew a broadcast license in a non-competitive proceeding because of program content -- until it took the action here challenged. In fact, in the only full-dress comparative renewal proceeding concluded to date, the existing licensee prevailed. Thus, because of its severity, with revocation or refusal to renew tantamount to a "death sentence," this remedy "has seldom if ever been invoked." H. Rept. No. 1800, 86th Cong. 2d Sess. p. 16. Accordingly, at the request of the Commission and the Attorney General, Congress in 1960 amended the Communications Act by authorizing the Commission to impose money forfeitures (47 U.S.C. Sec. 503(b)), by clarifying the Commission's power to grant short term renewals (47 U.S.C. Sec. 307(d)), and by strengthening the Commission's authority to issue cease and desist orders (47 U.S.C. Sec. 312(b)). Though thus adding to the Commission's arsenal of sanctions, Congress was careful to circumscribe even these lesser powers -- by limiting the amount of forfeiture in any single notice of apparent liability to $10,000, by providing on demand a trial de novo in a federal court, and by placing on the Commission the burden of proceeding and burden of proof in connection with any cease and desist or revocation orders. Those amendments to the Act were on the books when the instant hearing was ordered.

However, instead of proceeding under those newly acquired powers, the Commission saw fit to resort to the drastic (and theretofore unused) administrative remedy of starting a renewal proceeding looking toward imposing a death sentence because of the content of particular programs which WDKD had broadcast, almost ten months after the employee responsible for the objectionable language had been fired and the broadcasts had been discontinued.

The time lag which occurred between the time the Commission learned of Walker's broadcasts (April 1960) and the institution of the renewal hearing (March 1961) is not without significance. Had the Commission, upon receiving the tapes from a competitor been of the view that Walker's broadcasts were so foul that no delay could be brooked, it would have been necessary for the Commission, in order to impose a death sentence, to have proceeded by revocation, with the burden of proceeding and the burden of proof explicitly placed by Congress on the Commission (47 U.S.C. Sec. 312(d)). However, by delaying as it did for almost a year after the tapes were supplied, with WDKD's regular license period terminating in the interim, the Commission was able to proceed by renewal rather than by revocation, thus shifting to the applicant the burden of proceeding and the burden of proof (47 U.S.C. Sec. 309(c)).

The time lag is significant on still another score -- the charge that Robinson was less than candid in his response of June 10 to the Commission's letter of May 11, 1960 (R. 1419, fn. 2). Had Robinson said he knew that "obscenity" was broadcast over WDKD, such an admission would have furnished the proof needed for an immediate revocation proceeding, even though the Act places the burden of proof on the Commission. Because he denied such knowledge with respect to the taped items he was then confronted with a misrepresentation or lack of candor issue in a delayed renewal proceeding. This is entrapment and a denial of the privilege against self-incrimination. With a nollo contendere plea not available to a broadcaster when queried by an administrative agency, which has life-and-death powers over its licensees, the Commission's "standing alone" conclusion

about its "misrepresentation" issue shows the dangers of a licensing procedure where a bureaucracy takes on the role of investigator, prosecutor, judge, and jury and where First Amendment freedoms are involved.

In the hearing which followed, although finding adverse to the appellant on the four factual issues specified in the hearing Order, it is quite apparent that the Examiner thought that some in-between sanction would "better fit the crime" which he deemed proved (R. 921-927, Concls. 18-27). His adverse finding on Issue 2, as we have seen, stemmed entirely from the proposition that a licensee is legally responsible for everything that goes out over his station (R. 918, Concl. 11). Although critical of WDKD's programming, as measured by "Blue Book" concepts, he admitted that its operation (except for the objectionable material in Walker's programs) was much the same as other similarly situated stations (R. 920, Concl. 15).

Elsewhere the Examiner expresses a real "conviction" that Robinson has been thoroughly chastened and is now contrite and that such a person is "a better bet" to carry out his public service responsibilities than one who has not been subjected to discipline for wrongdoing (R. 923, para. 22). In fact, the Examiner was convinced that Robinson would not again "permit obscene matter to be aired over WDKD" (R. 922, para. 21).

Recognizing that a death sentence would be more severe "than many penalties that might be assessed by a Court following conviction for a crime,"[1] he searched for a less harsh alternative (R. 921, Concl. 18). He pointed out that Robinson had received no previous warning (R. 922,

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[1] Although no precise figures are contained in the instant record, there can be little doubt that Robinson by 14 years of effort has developed WDKD into a property worth well in excess of a quarter of a million dollars as a "going concern." Without a license, the physical assets of the station, sold as "used equipment", would probably not bring one-fifth that sum. A $200,000 fine, penalty, or assessment or deterrent, for broadcasts by a person who has not been connected with the station for more than three years, with the Examiner confident that Robinson would not again "permit obscene matter to be aired over WDKD," would appear out of proportion to the dereliction -- where scores of civic and other leaders of the area served by WDKD were unanimous in their view that Robinson's license should be renewed (WDKD Exs. 12-20, R. 377-385).

Concl. 19), that Robinson was a responsible leader of his community (R. 922, Concl. 20), and that he had marshaled "a formidable expression of community support for retention of his station's license" (R. 923, Concl. 23). However, in view of his limited authority (as contrasted with that of the Commission), the Examiner felt that he could not fashion any in-between penalty, and then proceeded to assuage his conscience by declaring the WDKD must be made an example of a new Commission "get tough" programming policy (R. 927, Concl. 27).

With Walker discharged more than three years ago, with not even a hint that there has been any off-color remarks since, with substantially every organization in Kingstree and Williamsburg County, including some 65 ministers, school officials, civic leaders, and governmental officials urging renewal (WDKD Exs. 12-20, R. 377-385), we submit that the Commission's refusal to use some less drastic sanction than the death sentence under the facts here disclosed was highly arbitrary and capricious -- even though this Court were to conclude that the Commission is not precluded by the First Amendment and by 47 U.S.C. Sec. 326 from delving into program content under a broad "public interest" standard. In fact, in Churchill Tabernacle v. Federal Communications Commission, 81 U.S. App. D.C. 411, 160 F.2d 244 (1947), this Court expressly held that a Commission decision conditioning renewal on a licensee's repudiation of a contract with the original owner of the station "needlessly destroyed private property in achieving a result that could have been just as well obtained under a less drastic order."

CONCLUSION

It has been shown that the Commission's refusal to renew WDKD's license, insofar as it was predicated on an examination into program content (Issues 2, 3,and 4), contravened the First Amendment and the no-censorship provisions of 47 U.S.C. Sec. 326, and that the Commission's conclusions regarding Issue 1 were in various respects illegal, arbitrary,

capricious, and contrary to the public interest. Accordingly, the decision below should be reversed and the matter remanded to the Commission for further proceedings, in accordance with law.

Respectfully submitted,

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PALMETTO BROADCASTING COMPANY
(WDKD)

July 5, 1963

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment (U. S. Constitution)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Communications Act of 1934 as amended (47 U.S.C. Sec. 151 et seq.)

Sec. 307. (a) The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes

of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

Sec. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . .

Sec. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,587

E. G. ROBINSON, JR., tr/as
PALMETTO BROADCASTING COMPANY (WDKD),
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Associate General Counsel,

RUTH V. REEL,
Counsel.

Federal Communications Commission
Washington, D.C. 20554

STATEMENT OF QUESTIONS PRESENTED

In a stipulation approved by the Court on April 2, 1963, the parties agreed that the following issue is presented:

> Whether the Commission's action in the circumstances of this case in refusing to renew the license of Station WDKD because of broadcasts by a disc jockey, which broadcasts the Commission found in an administrative proceeding on WDKD's renewal to be "coarse, vulgar, suggestive, and susceptible of indecent, double meaning," was violative of the First Amendment and of 47 U.S.C. Sec. 326, and in other respects arbitrary, illegal, and contrary to the public interest.

It was further stipulated that appellee believes the following issues are also present:

1. Whether the Commission correctly held that misrepresentations by the licensee independently warranted denial of renewal.

2. Whether the Commission correctly held that the resolution of two additional issues adversely to the licensee made the case for denial of renewal compelling.

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IN THE UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

We believe that a fuller statement of the case than that contained in appellant's brief will be of assistance to the Court.

This is an appeal filed pursuant to Section 402(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(2), from a Decision (R. 1416-1437) of the Federal Communications Commission released on July 26, 1962, and from a Memorandum Opinion and Order (R. 1580-1585) released January 7, 1963, denying reconsideration. The Commission's decisions denied appellant's applications for renewal of his license for standard broadcast station WDKD in Kingstree, South Carolina, and for a license to cover a construction permit for a change in that station's

antenna system.

The grounds of decision were that appellant (1) made deliberate misrepresentations and false statements to the Commission, (2) devoted a substantial amount of the station's broadcast time to programming which was patently coarse, vulgar, suggestive and susceptible of indecent double meaning, (3) over-saturated the programming with commercial announcements, and (4) failed to exercise proper control over the station's programming. The Commission concluded that the findings on (1) and (2) were each independently disqualifying and that the findings on (3) and (4) made disqualification compelling (R. 1584-1585, 1426).

The pertinent facts are as follows:

A. The Background

For a number of years appellant, E. G. Robinson, Jr., tr/as Palmetto Broadcasting Company (WDKD), here called "Robinson", has been the licensee of Station WDKD, the only standard broadcast station in Kingstree, South Carolina (R. 896).[1/] Kingstree, with a population of 3,874, has two high schools, two grade schools, 14 churches, a Carnegie library, a weekly newspaper, two hospitals, a number of civic organizations, and a considerable number of entertainment, commercial, and manufacturing enterprises (R. 896, 1433; 205-210).[2/] The town is also the county seat

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1/ While 26 stations provide radio service within WDKD's 0.5 mv/m (millivolt per meter) primary service area, only three serve a substantial portion of that area (R. 896).

2/ Where a semicolon appears in a series of record references, references preceding the semicolon are to the Commission's findings and succeeding references are to the supporting evidence of record.

of Williamsburg County (pop. 40,392), which is largely agricultural (R. 896, 1433).

On May 11, 1960, the Commission wrote Robinson that it had received complaints that certain programs broadcast on Station WDKD by one Charlie Walker allegedly contained vulgar, suggestive material susceptible of double meanings with indecent connotations, and that tape recordings of some of these programs were in the Commission's possession (R. 876-877; 211). Pointing to its practice of incorporating complaints in station files, the Commission requested Robinson to submit a statement within 15 days. (R. 877; 211).

On May 20, 1960, Robinson's counsel replied, stating that Robinson had no knowledge of having broadcast any vulgar or suggestive programs, and requesting an opportunity to hear the tapes in the Commission's possession (R. 877, 1431; 212, Tr. 140-141). After hearing certain taped Charlie Walker shows, Robinson's counsel wrote to Robinson on June 8, 1960, setting forth eight excerpts from the tapes, and concluding the letter with the following paragraph (R. 877; 213-214):

> As you can see, these are indeed suggestive and in some respects, vulgar. With the temper of the Commission being as it presently is, with Congress looking into the programming of the industry as a whole, and with the South Carolina licenses coming up for renewal in December, I believe it is necessary for you to take direct affirmative action to stop all broadcasts of this type. Further, it is my suggestion that the services of Mr. Walker be dispensed with and that you submit to the Commission, under oath, a statement indicating the action you have taken and attach thereto a statement of policy, which you should prepare and circulate among all of your employees who work on the air. This statement should clearly spell out immediate dismissal should anything off-color be detected in any broadcast. Please supply us

> with copies of your proposed response to the Commission so that we may check it over and offer any suggestions before its filing.

By letter dated June 10, 1960, Robinson stated to the Commission that he had just been informed by his counsel in partial detail of the contents of the taped Charlie Walker programs, but had previously been unaware of the nature of these broadcasts (R. 1635; 215). The letter continued (R. 878; 215):

> * * * These statements made by my employee, Charlie Walker, were not known to me, and I cannot help but agree that they are suggestive and, in some cases, of a vulgar nature. As a result of this information and in line with my avowed policy of maintaining a clean and decent Radio Station, I have unconditionally released Charlie Walker from my employ as of the date of this letter.

Attached to the letter was an affidavit repeating the assertions made in Robinson's letter (R. 878; 216).

Thereafter, Robinson filed applications for renewal of license and for a license to cover a construction permit for a change in the station's antenna system (R. 1416). By an order adopted on March 15, 1961, the Commission designated the applications for hearing (R. 1416; 106-107). The hearing order, which referred to the correspondence and statements of Robinson concerning the Charlie Walker programs, specified the following issues (R. 1416, 876):[3/]

> 1. To determine whether in its written or oral statements to the Commission with respect to the above matters, the licensee misrepresented facts to the Commission and/or was lacking in candor;

3/ The issues are set forth as they were finally amended by a Memorandum Opinion and Order released on May 4, 1961 (R. 876).

2. To determine whether the licensee maintained adequate control or supervision of programming material broadcast over his station during the period of his most recent license renewal;

3. To determine whether the licensee permitted programming material to be broadcast over Station WDKD on the Charlie Walker show, particularly during the period between January 1, 1960 and April 30, 1960, which program material was coarse, vulgar, suggestive, and susceptible of indecent, double meaning;

4. To determine the manner in which the programming broadcast by the licensee, during the period of his most recent license renewal has met the needs of the areas and populations served by the station;

5. To determine whether in light of the evidence adduced with respect to the foregoing issues, the licensee possesses the requisite qualifications to be a licensee of the Commission;

6. To determine whether in light of the evidence adduced with respect to the foregoing issues, a grant of the above-captioned applications would serve the public interest, convenience or necessity.

Hearings were held in Kingstree on May 31, June 1, 2, and 5, 1961 (R. 876). On December 12, 1961, the hearing examiner issued an initial decision, finding adversely to Robinson on all six issues and proposing that the applications be denied (R. 875-927). Following the filing of exceptions (R. 1088-1191, 1220-1258) and oral argument before the Commission (R. 1417), the Commission released its Decision on June 26, 1962, disqualifying Robinson and denying his applications (R. 1416-1435). On January 7, 1963, the Commission released a Memorandum Opinion and Order denying reconsideration (R. 1580-1585).

The Commission adopted the examiner's findings of fact, with certain modifications set forth in its Decision, and its rulings on exceptions (R. 1418). It agreed with the examiner's ultimate conclusion

and specified those respects in which it disagreed with the examiner's subsidiary conclusions (R. 1418-1435). The findings of fact and conclusions, as amended by the Commission, are summarized below.

B. The Commission's Findings of Fact

Charlie Walker was employed by Robinson as an announcer or disc jockey at Station WDKD from 1949 until 1960, except for a period of army service between 1952 and 1954 (R. 879, 885, 1584). During these eight years four hours daily (25% of the WDKD broadcast day) consisted of recorded music and commercials interspersed with comment and stories by Charlie Walker (R. 1426, 1584, fn. 5, 879; Tr. 136-137). The following verbatim transcript of excerpts from material broadcast by Charlie Walker on October 15 and 27, 1959, January 14 and 20, 1960, and April 25, 1960, was found to be typical of Walker's comment and stories throughout these years (R. 1425,1432, 885, 890-895; 423-434):

> Next Saturday it is we gonna have the big grand opening over at the new W. P. Marshall store in Greasy Thrill and we gonna come over there and let it all hang out. Course if we let it all hang out in Greeleyville, there ain't gonna be enough room over there for nothin' else, is there? 4/
>
> He says: "I believe that old dog of mine is a Baptist." I asked him why he thought his old dog was a Baptist and he says "you know Uncle Charlie it is that he's done baptized every hub cap around Ann's drawers." "You say it is all that all the hub caps in Spring Gully is going to Heaven?"
>
> If you're goin' to see a gal over in Poston you got to go see her after it gets dark, I mean you can't go over there in the daylight. And the reason you can't go over there in the daylight is because it is that them gals around Poston are so wild you know. They're so wild that you have to sneak up on 'em in the

4/ Walker, who frequently referred to himself as "Banana Nose", customarily referred to the various towns around Kingstree by nickname (R. 1647, 1640, 1706). For example, he referred to Greeleyville as "Greasy Thrill", Andrews as "Ann's Drawers", Bloomville as "Bloomerville", and St. Stephans as "St. Step Ins" (R. 890).

dark . . . And the only thing about sneaking up on 'em in the dark it is that you is liable to make a mistake; well I mean like I did one night, I thought I was sneaking up on one of dem gals from Poston and I was sneaking up on a cow. And do you know it is that I didn't even know I had a cow until it is that it swatted a fly off the end of my nose with its tail. When it swatted a fly off the end of my nose with its tail I began to get suspicious. I knew them gals in Poston couldn't do that.

He was getting hard up. You ever been hard up? They tell, Uncle Charlie it is we hard up for a little bit of music right now but we ain't gonna get none. I say you take a flying bite out of my shirt tail, hear? (This comment followed a story concerning a husband whose wife beat him each morning; the husband bought a bulldog and the wife beat the bulldog.)

Did you hear the one about the boy and the gal in the cow pasture? He was really lovin' that gal good. Boy he was lovin' that gal good. And it is that he was getting plenty wholehearted cooperation. He was. He was lovin' that old gal good. She was givin' him something besides lovin'. She was giving him whole-hearted cooperation. She was. And he decided that this is the gal for me; says "this is the gal I want to marry, right here." So he come right out and asked her. He says: "Darling, he says, will you marry me?" And she says, "well, I don't know." She says "tell me do you want a home?" And he says, "honey," he says, "I'm a regular home body." And she says, "And, what about children?" and he says, "Oh", he says, "Honey, I just love children." And she says, "well," she says, "in that case" she says "I'll marry you if you like children. We'll be in business in about six months!" (Laughter) They gettin' a head start!

It is you give me barbequed ice water and a green-eyed gal and I can go hard.

Betsy says it is that not only will she flirt with dynamite, but it is that if it's single she'll propose to it. Fool, you couldn't marry no dynamite. Betsy says it is that she don't mind marrying a stick of dynamite if he's got a long fuse. A long fuse? Betsy, will you go make me some French Market coffee and cut out your trash?

We's over in St. Step-ins yesterday. Had a glorious time.

I get so tired of people callin' me jackass. Them people over in St. Stephens in Russelville. They wouldn't say "Hello Uncle Charlie," they's say "hello jackass". . . It is that so many people done called me a jackass that, I'll tell you the

truth, it is that if I ain't got a saddle in the middle of my back I feel naked. All right, for every body whose got ants in their pants, I'll tell you what you do. You make your self a big pot of French Market Coffee, and then, pour the French Market Coffee in the seat of your britches. If you got any ants in your pants that'll get rid of them. Of course, it didn't work with my red bugs. And my darn bugs were making mud pies out of that French Market Coffee, and throwing them at my black heads.

I don't wanta save everything I get my hands on. I had my hands on something last night and I guarantee you boy I didn't want to save it . . . It is that you better believe that.

You hear 'bout de gal dat had a brand new boy friend? And, well, it her brand new boy friend . . . and her brand new boy friend he had been coming over to see her for a while, you know, and de gal's daddy decided that he'd better kinda lay down the law, you know, to his daughter's new boy friend, so he took the boy aside, you know, and he says, "Son," he says, "a man," he says "a man should be the boss of his house" . . . and, he says, "I'm telling you son, it won't take you long to find out that I'm the one who wears the pants in this family." And, the daughter's new boy friend says, "Oh, no sir", he says, "I know that", he says, "I found it out last night, sir!" . . . And in October too, already.

Bill Hyman (or Heiman) you know that works for Willie Tarte in Lake City he was telling me that, he used to have some ducks you know, used to raise ducks, and says, "Uncle Charlie", he says, "them durn fool ducks", you know he used to have him a little patch of green peppers, you know, that hot green pepper, and he used to have it in the garden, and he said "them durn ducks would get in the garden and eat that green, and eat that hot green pepper". And says, "then it is that the ducks had to fly backwards to keep from burning up" . . . laughter . . . "that's right", he said, "the durn, the old duck had to get up and fly backwards to keep from barbecuing himself" . . .

I'll tell you what that Snotty Cook at that Cook Shell station in the city by the Lake in Lake City says, and I believe this is the way that Lake City was born. You see, it is that Noah built his Ark, he took all the animals on board, see, I mean, he took all the animals on board, and of course, it rained for forty days and forty nights, but Noah had a problem, see? Because the Ark didn't have any bathroom on it. So the only thing Noah could do of course, was to take all the animals up on deck. But then he had a problem of how to get rid of it all, so he took a shovel and they shoveled it all over the side of the Ark into the water. So, it is that all of it settled and that's where Lake City come from. (At the end of this item Walker offered 10 printed copies of the lie he had just told for one dollar. This was followed by an offer of Bibles in exchange for coupons.)

Careful drivers can have accidents. Careful boy friends can have accidents too.

I seen something last night that I wanted. I wasn't too bashful to go get it. I was just too smart. She had her husband with her. My mama didn't raise no foolish young 'uns.

That's the scientific word for happy horse crud. (This explanation followed a reference to "noise distortion."

Why don't you get off your ding dong friend, you'll never make a million lying up in the bed looking at the ceiling.

Betsy, you're not producing, you're not. Betsy says give her time she's not married yet. Now you know what I'm talking about.

You always drink plenty of big value coffee and you'll have enough strength to tell your girl friend no when she wants to go to the cow pasture and you want to go to prayer meetin' you know and it is you'll have enough strength to tell 'em no. That's right.

It is that I always tell them no, not because I'm such a good boy but because it is that I ain't got enough strength to do anything else.

It is that my girl still loves me when I let 'er. See I don't let her too often because I don't wanta spoil her, see. I mean if you give women everything they want you spoil them, see. It'll break you and spoil them.

Uncle Banana Nose lettin' it all hang out . . .

I used to go with this gal that worked in that five and dime over in Greeleyville and you know it is that I'd take the gal out you know and anytime it is I'd kiss the old gal or hug her or squeeze her or tease her she'd say "Will that be all sir?" You see that's what they say all day long at the five and dime, will that be all sir? I broke her of that habit though. It is that I broke her of that habit. It is that I got that old gal to where she'd quit saying "Will that be all sir?" She started saying "That's enough Charlie." You gotta break 'em.

You know that Betsy goes over to Lake City every night, she does, she goes over to Lake City and they beat the devil outa her but that don't make no difference. She go back right over there again tonight. Well, I ain't never seen nobody like you Betsy that likes to go 13 miles just to get your rear end cut. I'll tell you what, if you want to stay home tonight I'll be glad to do it for you and save you the trip. I don't know what makes them people

so rough over there. Really I don't . . . People in Lake City don't love nobody. I know because I given them several opportunities to love me and they passed it up . . . I mean them girls over there have had several opportunities and they passed it up.

You farmers better get off of it and get out there and get in at them tobacco fields. We don't want no crop failures this year. It is that we don't want any farmers to have any crop failures. I know about eight farmers' daughters and I hope like the devil they have a crop failure (laughter). All I got to say they better have one! If they don't have a crop failure I'm gonna have a heart failure.

I've always been a gentleman, I sure don't go around beating up my women before I love 'em . . . Tell me, would you go around bruising up your groceries before you eat 'em? Well, that's the way I feel about them gals. (This followed a comment concerning Mickey Spillane beating up women before loving them since they then could not fight back.)

If Williamsburg County was a big old house, Lanes would be the privy.

You know they always told me if you had a problem the best thing to do was go home and sleep on it. It is. Now I'll give you just three guesses what my problem is. I'll just give you three guesses as to what my problem is. (Recorded girl's voice:) "Ain't you gonna kiss me" (Response in male voice:) "U'nh-u'nh." Well, that's my first problem right there. I get so tired of hearing that.

Old Willy Tart. You know Willy's getting kinda old now. Of course it is that he still likes to go out with the girls, but when he does it's only to refresh his memory because that's all he can do, refresh his memory. But we'll all be in the same boat one of these days, will we not?

I used to go out with a gal cause she had plenty of lovin' but now I go out with her cause she's got plenty of patience.

He was telling me, he says, "Uncle Charlie," he says, "we had fourteen in the family. There was fourteen of us not countin' the hogs too." He says, "There was fourteen in the family." And he says "Uncle Charlie," he says, "we didn't have but one privy," he said, "one out-house, and that one out-house was sittin' on top the hill in back of the house." And he says "do you know," he says, "in three years' time with all fourteen in the family using it, in three years' time that privy was on flat ground. That family wore out that hill going back and forth. They did." He says "Uncle Charlie," he says "they was always two of us going, two of us coming back, and one of us in

there all the time, 24 hours a day." That's right, that's what he said, he says "Uncle Charlie," he says, "that's the first time in my life I ever heard of a hole getting wore out." And you know, come to think of it, I never heard of no hole getting wore out.

You know they got a rooster down there at Frank Parsons Shell Station -- a little old bantam rooster and that bantam rooster's name is "Big Dick." And any time you go down to Frank Parsons and you wanta see that old rooster all you gotta do is stand out there in the middle and holler "Hey Big Dick" and that old rooster will comma running.

I can remember back when I was a single boy. It is that my britches used to be wrinkled all the time too, but the reason my britches was wrinkled when I was single is because gals was always sittin' on my lap and that's why it is that my britches was always wrinkled. Man, times do change. Now what I got in 'em's wrinkled.

I got some britches at home that it is that if the crease in those britches could talk . . . my wife woulda been done killed me a long time ago.

Upon the basis of such material, the Commission found that WDKD had broadcast "extensive amounts of coarse, vulgar, suggestive, double-meaning programming" which was flagrantly offensive by any standard in the context of the broadcast field (R. 1423-1425, 1532-1534).

Robinson at first denied and then later admitted at the hearing that he had some knowledge of the nature of Walker's broadcasts before the Commission had brought the matter to his attention (R. 881, 883; Tr. 314, 315, 215, 222-223, 225, 233). The examiner and the Commission did not credit Robinson's testimony that he had not known about and had never received any written or oral complaints about vulgar and indecent programs (R. 1430, 1419-1420, 921, 880; Tr. 226-227, 230-232, 332).[5/] The

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5/ The examiner and the Commission found that Robinson was otherwise unreliable as a witness. In all instances of conflict with other witnesses, they credited the other witnesses (R. 1420, 921). For example, the Commission found that Robinson misrepresented the facts when he testified that he averaged 6 hours a day at the station and scheduled (cont'd)

Commission found, on the contrary, that Robinson had known the nature of Walker's broadcasts both from his own knowledge and from complaints he had received, and that he had misrepresented the facts with respect to his knowledge (R. 1419).

Robinson knew about Walker's nicknames for various towns and had admonished him several times on this score (R. 879, 881; Tr. 215, 222-223, 233). Beginning in 1959, he had tried to monitor a portion of all of Walker's programs (R. 881; Tr. 225). On three separate occasions he had called Walker's attention to the use of the phrase, "let it all hang out" (R. 883; Tr. 314). Once he asked for an explanation when he heard Walker tell a story on the air about carrying his girl to a cow pasture to relax and end by saying, "And that's right" (R. 883; Tr. 314). Robinson has also heard Walker refer to himself on the air as "Banana Nose" (R. 883; Tr. 315).

When Station WDKD began operations in 1949, Marion L. Few was a partner and half owner with Robinson (R. 885; Tr. 716). Few often received complaints concerning Walker's programs, which he passed on to Robinson (R. 885; Tr. 719, 720). In 1955 or 1956 Few discharged Walker after hearing him broadcast the following story (R. 885; Tr. 723-724):

> Well, it seems that this couple had gotten married. After about three days the old boy got the first look at her feet, and he asked her why she had such big cracks between her toes. She said, "Well, you know, I got those big cracks between my big toes from walking in that Georgia mud barefooted." He said, "Are you sure that you didn't spend your time sitting in that Georgia mud?"

5/ (Cont'd) staff meetings every two weeks (R. 1418; Tr. 159, 166-167, 240-242). Employees testified that Robinson spent only 3 or 4 hours a day at the station and that very few staff meeting were held (Tr. 523, 639, 677).

Robinson promptly reinstated Walker (R. 886; Tr. 724). Some eight months later Few severed his connection with Robinson and the station because of his disagreement with Robinson over whether Walker should be retained at the station (R. 886; Tr. 729).

Two local ministers, who testified that they had heard Walker broadcast jokes of the type set forth above, complained to Robinson about Walker's material and conveyed to him the complaints of members of their congregations (R. 886, 887; Tr. 546-562, 579-584, 586-588). The announcer who replaced Walker when he was away in the Army received some 50 letters objecting to Walker's return and complaining about his language, some of which he presented to Robinson (R. 887, 1433; Tr. 683-684, 685). Two advertisers cancelled their advertising on Station WDKD because of Walker's program; one of these, the general manager of a Sears Roebuck store, told Robinson his reasons for cancellation (R. 887, 888, 1433; Tr. 642, 737, 739-741, 743-744).

Nine witnesses testified that Walker's programs had a community reputation for coarse, vulgar, suggestive and indecent material (R. 1433; Tr. 436-437, 528, 559, 597, 662-664, 694-695, 740, 750-755, 819). Walker's programs were discussed critically among members of the South Carolina Broadcasters Association, who considered them not conducive to good broadcasting; according to the executive secretary of the association, programming of this nature generates pressure on competitor stations to lower their standards of quality because it is "easy to peddle smut" (R. 888; Tr. 658, 661-662, 664, 667-668).

The presentation of commercial spot announcements also was found to have played a major role in WDKD's on-the-air operation during its last renewal period (R. 897), to the extent that WDKD's "programming was frequently saturated with commercial announcements" (R. 1426). Robinson, in his renewal application, stated that the station did not expect to present more than four spot announcements during any 14 1/2-minute time period (R. 897; Tr. 254). He later testified that this statement was a mistake (Tr. 254); what he had intended to say was that not more than four minutes of spot announcement continuity would be included in any 14 1/2-minute time segment (27%). Robinson admitted that on occasion, due to pressure from advertisers, the station presented as many as ten, twelve, or fourteen spot announcements during a 14 1/2-minute time segment (Tr. 177, 251-253), that he would not be surprised if WDKD had broadcast as many as 420 spot announcements in one day (Tr. 254-255), that when the station ran behind schedule, program material other than spot announcements was omitted (Tr. 258-259), and that the announcers sometimes complained about the amount of commercial continuity they were required to present (Tr. 267).

The WDKD program director, Ashby Ward, testified that it was not unusual for him to broadcast as many as ten spot announcements in a 14 1/2-minute time period and that on one occasion he recalled presenting fifteen (R.. 897; Tr. 533, 536). A former WDKD salesman, S. Charles Green, testified that during sales trips he frequently heard complaints to the effect that the station was running too many spot announcements back-to-back and too close together (R. 897; Tr. 642-644).

WDKD had represented in its renewal application that for its composite week no spot announcement exceeded one minute in length, that only 46 segments contained four spot announcements, and 84 segments contained five spot announcements (R. 1433-1434; 439). In fact, WDKD's spot announcements sometimes exceeded one minute in length, 54 segments contained four spot announcements, and 132 contained five (R. 1433-1434; R. 439, 437; Tr. 643, 255, 256, 258).

Robinson further represented in his renewal application that 1,077 spot announcements were carried during the composite week (R. 898, fn. 13; R. 439). In fact, the number was 1,448 (R. 898; R. 437).

This figure does not reflect the numerical peaks and concentration of spot announcements which the station frequently achieved (R. 898). For example, on each of three days in August 1960, the station carried 440 or more spot announcements (R. 898; Tr. 255-256, 787). On October 16, 1959, the "Hymn Time" program which began at 10:10 a.m. contained spot announcements at the following intervals of time: 10:10, 10:12, 10:14, 10:18, 10:19, 10:21, 10:22, 10:23, 10:24, 10:25, 10:27, 10:28 (R. 898; Tr. 263). Six other programs presented on various days in October, 1959 contained comparable numbers of commercials at one or two minute intervals (R. 898; Tr. 265-267). On Christmas Day 1959 on a program entitled "Christmas Music", WDKD carried 35 commercials, mostly at half-minute intervals, between 2:30 and 2:59:20, and 17 commercials during the time segment between 3:31:30 and 3:45 (R. 898; Tr. 780-782).

On a representative day, June 1, 1960, some 17% of the station's broadcast time was devoted to material other than recorded music programs and spot announcements (R. 899-901; R. 442-456). News and/or weather

was presented 14 times, the programs averaging 4 1/2 minutes; sports were presented twice, each program lasting 9 1/2 minutes; there were four transcribed (paid) political broadcasts, each 4 1/2 minutes; and one each of programs concerning religion (14 1/2 minutes), agriculture (9 1/2 minutes), and classified want ads (14 1/2 minutes) (R. 901; R. 442-446).

The Commission found that during its most recent license renewal period, the station had fully met a licensee's responsibilities only in the fields of religious programs, weather and market reports, and sports (R. 920, 1435). The station had devoted inadequate time to agricultural programs in light of the predominantly agricultural economy of the area, fell short in its responsibilities in the area of political broadcasts, presented "variable and skimpy" news programs,[6/] and provided virtually no opportunity for local self-expression or the development of local talent (R. 1435, 920). WDKD carried no educational programs, no public affairs programs, no editorial programs, no children's programs (except for recorded music programs directed at teen-age audiences), and no programs for minority groups (except for recorded music directed at Negro audiences).[7/] (R. 1434-1435, 920, 902, fn. 19). The Commission found that Robinson had failed to establish that he made a conscientious, earnest effort to ascertain the broadcast needs of the community or to program in conformance with local needs (R. 1434-1435, 920).

6/ WDKD carried news "headlines" lasting one minute, and news programs lasting approximately 4 1/2 minutes (R. 903, fn. 20, 901; Tr. 173). News originates from whatever information comes to the station during the day plus information from the United Press wire service (R. 903; Tr. 173, 304). Selection is made by the announcers on the basis of what they believe the station's listeners would like to hear (R. 903; Tr. 173).

7/ The Negro population of Kingstree and Williamsburg County constitutes 44% and 68%, respectively, of the total population (R. 896).

C. The Commission's conclusions

The Commission concluded that Robinson knew the true character of the Charlie Walker broadcasts prior to May and June 1960 and that his denials of knowledge during the pre-hearing investigation were purposeful misrepresentations (R. 1418-1420, 1581-1582). It further concluded that Robinson had continued his lack of candor about the Charlie Walker broadcasts in his testimony at the hearing, and had misrepresented other facts pertaining to his control over the station (see fn. 5 supra), the number and frequency of commercial spot announcements, and overall program content (R. 1419-1420, 1581-1582). The Commission determined that the licensee's misrepresentations and false statements in and of themselves constituted ground for denial of his application (R. 1420, 1584).

Finding that the Charlie Walker material was on its face "coarse vulgar, suggestive and susceptible of indecent double meaning" (R. 1425), [8] the Commission determined that Robinson's conduct in permitting the station to be operated in this manner for a substantial period of the broadcast day over many years, similarly, was sufficient, standing by itself, to require a denial of his renewal application (R. 1425). It rejected WDKD's claim that the Charlie Walker material was mere "buffoonery and attempted bucolic badinage" (R. 1425, 1583). The Commission stated that, by any standard, however reasonably weighted in the licensee's favor, [9] the Walker programs were obviously offensive and patently vulgar in the broadcast field, and

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8/ Although noting its authority to consider violations of Section 1464 of the Criminal Code, 18 U.S.C. 1464, which provides for a fine and/or imprisonment for the utterance of "any obscene, indecent, or profane language by means of radio communications," the Commission expressly declined to determine whether the Charlie Walker material was "obscene" or "indecent" within the meaning of that section, since the question of violation of Section 1464 was not encompassed within Issue No. 3 (R. 1422, 1424).

9/ The Commission noted that Robinson himself, when confronted with some of the broadcasts by Charlie Walker, described them as suggestive, (cont'd)

were unacceptable to the listening public in and around Kingstree, as demonstrated by the preponderance of the testimony in the record (R. 1425, fn. 9).[10/]

While recognizing the great importance of First Amendment and censorship considerations (R. 1424-1425), the Commission was unable to accept WDKD's argument that it could not constitutionally consider at the time of renewal the fact that the station had carried extensive amounts of coarse, vulgar, suggestive, double-meaning programming (R. 1423-1425). The Commission stressed that it was not ruling that one, or a few off-color jokes or programs, would bar a renewal of license (R. 1425, 1583). It stated (R. 1425):

> We are saying that this licensee's devotion of so substantial a portion of broadcast time to the type of programming set forth in the Examiner's Initial Decision is inconsistent with the public interest and, indeed, represents an intolerable waste of the only operating broadcast facilities in the community--facilities which were granted to this licensee to meet the needs and interests of the Kingstree area.

Apart from the Walker material, the Commission found that WDKD's operation during the most recent license renewal period was not in the public interest (R. 1437). Pointing specifically to the excessive number of spot announcements, the Commission was compelled to the conclusion that "Robinson tailored his operation more to the convenience

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9/ (Cont'd) vulgar and of an uncouth nature (R.1583). It also noted (ibid.) that Robinson did not present any evidence to show that the programming was not offensive or that it in some way served the needs of the area.

10/ The Commission made clear that its "patently offensive" standard applied only to matter that is alleged to be "coarse, vulgar, suggestive or susceptible of indecent double meaning," and that this standard has no applicability to other types of programming -- e.g., religious or controversial-issue broadcasts -- that might happen to offend some segment of the public (R. 1582).

of his advertisers than to the need of the public" (R. 1426). It also concluded that Robinson had failed to maintain proper control over programming, as evidenced by the protracted broadcasting of the Walker material (R. 1420-1421). The Commission stated that the over-commercialization and laxity of control alone might have resulted only in a short-term renewal, but that in the circumstances of this case they were factors bolstering its determination that a renewal of license should be denied (R. 1420-1421, 1425-1426, 1584-1585). 11/

11/ On January 31, 1963, the Commission stayed the effectiveness of its orders pending judicial review, and authorized Robinson to continue operating the station until 30 days after a decision by the Court.

SUMMARY OF ARGUMENT

I.

The Commission's finding that Robinson knew the true character of the Charlie Walker broadcasts and that his denials of knowledge, and of having received complaints, were purposeful misrepresentations and false statements, has ample support in the record. Its determination that this misconduct, standing alone and without regard to the quality of the station's past service, called for a denial of the renewal application, was clearly proper and within the Commission's discretion. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 228-229; Broadcasting Service Organization, Inc. v. Federal Communications Commission, 84 U.S. App. D.C. 152, 171 F.2d 1007, reversed 337 U.S. 901; Independent Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D. C. 396, 193 F.2d 900, cert. denied 344 U.S. 837; Charles C. B. Pinson, Inc. v. Federal Communications Commission, __ U.S. App. D.C. __, __ F.2d __, (Case No. 17,441, decided June 13, 1963); Immaculate Conception Church of Los Angeles v. Federal Communications Commission, __ U.S. App. D.C.__, __ F.2d __ (Case Nos. 17,239 and 17,246, decided July 5, 1963).

Robinson did not challenge the propriety of the Commission's inquiry at the time of his denial of knowledge in 1960, and could not in any event pretend to make a full reply which was in fact a deliberate misrepresentation. The Commission properly considered this matter in conjunction with appellant's application for renewal of license, instead of instituting revocation proceedings, particularly since the end of the license period was near at hand.

II.

A. The Commission's determination that the broadcast by appellant of a substantial amount of programming which was patently offensive because it was "coarse, vulgar, suggestive and susceptible of indecent double meaning", also, in and of itself, warranted a denial of renewal of license, was a proper exercise of the Commission's authority to consider a station's past operation under the public interest standard of the Communications Act. Sections 307(a) and (d), 309(a), 47 U.S.C. 307(a) and (d), 309(a). Appellant's contention that the Commission has no constitutional or statutory power to review program content, is refuted by numerous court cases as well as by the legislative history of the Act. It has long been settled that the Commission has authority to consider the past or proposed service of an applicant, and that a denial of license upon a ground reasonably related to the public interest, including the character and quality of the program service, is neither censorship within the meaning of Section 326 of the Communications Act nor an abridgement of the right of free speech. National Broadcasting Co. v. United States, 319 U.S. U.S. 190; Simmons v. Federal Communications Commission, 83 U.S. App. D.C. 262, 169 F.2d 670, cert. denied 335 U.S. 846; Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F.2d 351; Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191, cert.denied 371 U.S. 821; KFKB Broadcasting Assn. v. Federal Radio Commission, 60 App. D.C. 79, 47 F.2d 6070; Trinity Methodist Church, South v. Federal Radio Commission, 61 App. D.C. 311, 62 F.2d 850, cert. denied 284 U.S. 685, 288 U.S. 599.

The validity of these decisions is not cast in doubt by decisions of the Supreme Court in fields other than broadcasting. While the protection of the First Amendment extends to broadcasting (and to entertainment programs), different rules are appropriate for different media of expression in view of their varying natures. Burstyn v. Wilson, 343 U.S. 495, 502-503; Kovacs v. Cooper, 336 U.S. 77, 96, 97. The Commission's concern with program content in granting or renewing licenses does not stop with a decision that the material falls within the protection of the First Amendment; it necessarily extends also to consideration of whether the programming serves the public interest. The statutory "public interest" standard is appropriate to a medium which inherently is not available to all, and it provides an adequate standard for both discretionary Commission action and judicial review. National Broadcasting Co. v. United States, 319 U.S. 190.

B. The Commission's particularization of the statutory standard in this case is sufficiently clear and precise under the circumstances here. The Commission determined that a renewal of license would not serve the public interest where a substantial portion of the station's program service over a long period of time was devoted to material which was patently "coarse, vulgar, suggestive and susceptible of indecent double meaning" and flagrantly offensive by any standard, however reasonably weighted for the licensee. Moreover, there was no serious claim by the licensee that the Charlie Walker material, viewed as a whole, was not offensive, that it was of artistic merit, or that it served the needs of the service area or the public interest. Since the Commission was deciding a

particular case of adjudication, the terms "coarse, vulgar, suggestive and susceptible of indecent double meaning" take concreteness from the material which they describe. There was no occasion for the sort of comprehensive definition which the brief amicus curiae of the American Civil Liberties Union appears to demand, as this was not a rule making proceeding and the Commission was not announcing a general rule to be applied to conduct which had not yet occurred.

The Commission has a proper concern with a pattern of operation which is patently offensive and vulgar and which the licensee itself is unwilling to defend as in the public interest. It has a right to compel an applicant to prove that there is something more than naked commercial selfishness in his purpose. Misuse of a public trust is clearly relevant to the statutory objective. The Commission's concern with the sensibilities of the housewife, teen-ager, and the young child, also has a legitimate basis in the context of radio broadcasting, and particularly in the case of disc jockey patter. The suggestion of the ACLU that the Commission's decision may stifle creative programming is without substance. The Commission was at pains to limit its holding to the facts of this case, pointing out that the test it employed would not necessarily apply to other types of programming.

III.

The record amply supports the Commission's findings that Robinson failed to maintain adequate control over the station's programming and that the station carried an excessive number of commercial spot announcements. The Commission properly concluded that these deficiencies were not compatible with the responsibilities required of a licensee and that they made a denial of renewal compelling when added to the licensee's

misrepresentations and the Charlie Walker broadcasts.

ARGUMENT

I. THE COMMISSION PROPERLY DETERMINED THAT THE LICENSEE'S MISREPRESENTATIONS INDEPENDENTLY WARRANTED A DENIAL OF HIS RENEWAL APPLICATION

Appellant contends (Br. 34-45) that the Commission could not properly find that he was guilty of misrepresentation with respect to his knowledge of the nature of the Charlie Walker broadcasts, and further (Br. 45-48) that it was arbitrary to deny a renewal of license because of this factor. However, the Commission's finding that Robinson lacked candor and deliberately misrepresented facts concerning his knowledge of the nature of the Charlie Walker programs (R. 1418-1420, 1581-1582), has ample support in the record, and this finding fully justified the Commission's determination that a renewal of license would not serve the public interest.

As set forth in the Counterstatement, Robinson, in the letter and affidavit which he submitted to the Commission on June 10, 1960 in response to the Commission's prehearing inquiry, flaty denied having any knowledge of the nature of the Charlie Walker programs before his counsel apprised him of the items contained in the tapes in the Commission's possession (R. 878, 1418-1419; 215-216).[12/] In his initial testimony at the hearing Robinson similarly asserted that

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12/ The Commission properly rejected appellant's contention (appearing again in its brief, pp. 39-40) that Robinson's denial went only to the eight items listed in his counsel's letter. It correctly noted that the language of Robinson's letter was not restricted to those eight items but went rather to Walker's performance in general (R. 1419, fn. 2; 215). The Commission also pointed out that its inquiry imposed a duty of candid response on Robinson, and that any intent by Robinson to limit his denial to those items specified in the letter to him from his counsel (cont'd)

he had known of nothing coarse, vulgar or suggestive in the Walker broadcasts (R. 1581; Tr. 140-141, 149-153, 155). Robinson further testified that he had never received any written or oral complaints about the Charlie Walker program (R. 880, 1581; Tr. 155-158, 226-227, 230-232, 332).

That Robinson had more knowledge than he professed in his written statements to the Commission and in his initial testimony at the hearing, is shown initially by his own contradictory testimony under cross-examination. Robinson admitted that even before receipt of any notice from the Commission regarding the Walker programs, he had heard Walker use the suggestive term "let it all hang out," and had heard other remarks of a questionable nature about which he had admonished Walker (R. 1581, 881, 883; Tr. 215, 222-223, 225, 233, 314, 315-316).

Moreover, Robinson's denial of knowledge was at odds with the unimpeached testimony of several witnesses (see supra, pp. 12-13) that they had complained directly to Robinson (R. 1581, 1419-1420, 885-888). Thus, Carroll Godwin, an announcer at Station WDKD from June 1, 1952 to October 30, 1956 (Tr. 575), presented complaints to Robinson (or his wife) which had been made to the station (Tr. 683-684, 685-686); Reverend James Lawton, who had read FCC Exhibit No. 2 (R. 423-434) which set forth the material we have quoted in the Counterstatement, pp. 6-11 (Tr. 579), testified that it was typical of material he had heard on the Charlie Walker program (Tr. 580), and that he had suggested

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12/ (cont'd) would constitute a culpable lack of candor. (R. 1419, fn. 2). See Hall v. Federal Communications Commission, 99 U.S. App. D.C. 86, 96, 237 F.2d 567, 577 . Nevertheless, Robinson still contends (Br. 39, fn. 1) that his letter to the Commission should be read as referring only to the eight items mentioned in his attorney's letter to him.

to Robinson on two occasions that the Charlie Walker show was improper (Tr. 581-583); Reverend Bernard Drennan, who also read FCC Exhibit No. 2 (Tr. 547), testified that he had heard some of the same material on the air (Tr. 549), that it was typical of material on the Charlie Walker program (Tr. 550-551), and that he had spoken to both Mr. and Mrs. Robinson on different occasions about the Charlie Walker show (Tr. 554-555, 556-557).

Mr. A. E. Creamer, general manager of a Sears Roebuck and Co. store, cancelled advertising on WDKD in 1957 in part because of the nature of the Charlie Walker show (Tr. 740-742, 746), and advised Robinson of the reason (Tr. 743-744). Furthermore, Ashley Ward, an employee of the station, communicated complaints to Mrs. Robinson (Tr. 526-527) (who was second in command at the station, Tr. 530), and, as we have stated supra, p. 13 , the Charlie Walker program had a reputation for vulgar and indecent material in the community at large. In addition, Robinson's former partner, Few, testified that the Charlie Walker show regularly contained material susceptible of indecent meanings, that he had received complaints, and that he had told Robinson of these complaints (Tr. 716-729).

The Examiner, who observed the demeanor of the witnesses, found against Robinson on credibility and believed the other witnesses on points of conflict, stating that he had "no reasonable basis to doubt the veracity of those whose testimony was at odds with that given by Robinson," but that he did have "cause to doubt

that on the stand Robinson testified to the whole truth" (R. 921).[13] In agreeing with the Examiner's credibility findings, the Commission noted (R. 1419-1420) that Robinson had also misrepresented facts pertinent to other aspects of the hearing, such as the frequency with which staff meetings were held and the number and length of commercial spot announcements (supra, pp. 11-12).

Moreover, Robinson's denial of knowledge of the nature of the Charlie Walker material appeared inherently incredible to the Commission. Robinson was not an absentee licensee, and the material adduced in the record was typical of matter broadcast by Walker for a substantial portion of the day over a number of years. Since the record overwhelmingly established that Walker's programs had a general community reputation for vulgarity, suggestiveness, and coarseness, it seemed to the Commission "inconceivable that so many persons in the small town of Kingstree (approximately 3,847, pop.) and surroundings could know about this but Robinson did not" (R. 1419, fn. 3, 1581).[14]

Appellant's brief contains no substantial refutation of these matters. The contention (Br. 37-38) that the Commission could not properly ascribe to Robinson the letter of May 20, 1960 to the Commission

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13/ While appellant first claims (Br. 43) that the examiner made no supporting "findings," he is forced to recognize (Br. 44) that the examiner did find Robinson's testimony to be marked "by vagueness and ambivalence" (R. 921). Appellant's explanation that he might not have heard and understood the questions is not supported by the record. There is no indication that Robinson, on the matters at issue here, was misled by questions he did not hear.

14/ Accepting arguendo Robinson's plea of ignorance of the true character of the material broadcast by Walker, the Commission found that in that event he had failed to exercise proper control over the station's programming, and had accordingly failed to meet a "most fundamental licensee obligation" (R. 1420-1421).

from Robinson's counsel, which stated that "Station WDKD has no knowledge of having broadcast any 'vulgar or suggestive' programs" (R. 212), is patently unsound. The letter was written by counsel, it purported to speak on behalf of the station, it was written after counsel conferred with Robinson (who had talked to Walker) (Tr. 140-142), and it has not been repudiated.[15/] So too, it appears frivolous to suggest, as appellant does (Br. 37-38), that the denial in the May 20, 1960 letter was merely a technique used to secure an opportunity to hear the tapes in the Commission's possession.

Putting aside (as does appellant, Br. 39) Walker's puns on the names of local communities, the testimony referred to above makes clear that Robinson was well aware of the full nature of the Charlie Walker broadcasts. Not only is it inconceivable that, as a resident owner, he did not know, but the claim (Br. 40) that the reason for two of the complaints "might not have registered completely with him" raises no more than a question of resolving the evidence, a question which the examiner and the Commission decided upon clearly substantial evidence. So too, the evidence is clearly adequate to sustain the finding that the material in FCC Exhibit No. 2 was typical of Walker

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15/ As appellant points out (Br. 38, fn. 1), it requested a precise identification of the written statements referred to in hearing Issue No. 1, and the Commission stated (R. 174) that it was clear that the statements "include[d]" the letters and affidavits of June 10, 13 and 22, 1960, without mentioning the May 20, 1960 letter. But, as the Commission then stated in denying further particularization of the issue, the documents were particularly within appellant's knowledge. Furthermore, appellant's petition for reconsideration (R. 1453-1477) made no mention of this alleged error, and it cannot be raised for the first time upon appeal. Communications Act, Section 405, 47 U.S.C. 405. Finally, consideration of the attorney's letter could not possibly have created any prejudicial surprise.

broadcasts over an extended period.[16] Robinson's knowledge was clear, whether or not he "could afford the luxury of listening day after day with rapt attention to Walker's broadcasts" (App. Br. 41).[17]

Accordingly, the Commission was fully warranted in finding that Robinson knew the true character of the Walker broadcasts and that his denials of knowledge, and of having received complaints, were purposeful misrepresentations and false statements (R. 1420, 1581-1582). There was clearly substantial evidence in the record as a whole to support the findings. No more is required. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474.

Concluding that these misrepresentations, particularly as they "continued during the very hearing itself," could not be tolerated, and that they established Robinson's unfitness to be a licensee, the Commission determined that this misconduct, standing alone and without regard to the quality of the station's past service, called for a denial of the renewal application (R. 1420, 1426, 1582).[18] This determination was clearly proper

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16/ For example, the testimony of Robinson's former partner Few concerning Walker's broadcasts in 1956 can hardly be said to be refuted by the fact that Few could have bought Robinson's interest and then fired Walker (see App. Br. 42). And the fact that the ministers might have given Robinson a renewal of license despite the Walker broadcasts (App. Br. 43) shows merely an irrelevant difference of opinion on a separate policy question.

17/ The examiner found (R. 881-882) that beginning in 1959, Robinson tried to monitor a portion of all of Walker's programs.

18/ In denying reconsideration, the Commission stated that even if the station's over-all programming record were to be considered, the showing made would fall far short of overcoming the adverse factors found in the Charlie Walker programs and the misrepresentations (R. 1584). In declining to find any mitigating factors, it pointed particularly to the serious over-commercialization practices and the other shortcomings found in the station's over-all programming.

and well within the Commission's discretion. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 228-229; Broadcasting Service Organization, Inc. v. Federal Communications Commission, 84 U.S. App. D.C. 152, 171 F.2d 1007, reversed 337 U.S. 901; Independent Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 396, 193 F.2d 900, cert. den. 344 U.S. 837; Charles P. B. Pinson, Inc. v. Federal Communications Commission, __ U.S. App. D.C. __, __ F.2d __ (Case No. 17,441, decided June 13, 1963); Immaculate Conception Church of Los Angeles v. Federal Communications Commission, __ U.S. App. D.C. __, __ F.2d __ (Case Nos. 17,239 and 17,240, decided July 5, 1963).

Appellant suggests, finally (Br. 45-49), that the Commission's decision is arbitrary because the Commission could have imposed a sanction of lesser severity, because the delay in instituting the renewal hearing permitted the Commission to put the burden of proof on Robinson (rather than on the Commission in a revocation proceeding), and because the Examiner believed that Robinson could now properly carry out his responsibilities under the Communications Act. The first and last of these three contentions obviously constitute only disagreement with the Commission's judgment that the misrepresentations of Robinson warranted a denial of his application for renewal of license.[19/] As the cases cited immediately

19/ Robinson's contention (Br. 45) that the case marks the first time the Federal Communications Commission has refused to renew a broadcast license because of program content, ignores the fact that the Commission found the misrepresentations to constitute an independent ground for denial. Furthermore, although the contention does not in any event indicate arbitrariness on the part of the Commission, it may be noted that a approximately the same time it decided this case, the Commission also denied a renewal of license to another broadcast station, partly upon the basis of program content. See Immaculate Conception Church of Los Angeles v. Federal Communications Commission, decided July 5, 1963 (Case Nos. 17,239 and 17,240, C.A.D.C.).

above demonstrate, the Commission was fully justified in determining that a renewal of license should not be granted.

Appellant's second point -- that the Commission should have assumed the burden of proof by proceeding by way of revocation -- is equally insubstantial.[20] The Commission first wrote to Robinson on May 11, 1960 concerning the complaints it had received (R. 211). The Commission received a response from Robinson's counsel on May 20, 1960 (R. 212), and received a further response and affidavit from Robinson on June 10, 1960 (R. 215). The license for Station WDKD expired on December 1, 1960, and the application for renewal of license was filed on September 7, 1960 (R. 9). Although the hearing itself was not instituted until March 1961, it is clear that the renewal of license was imminent at the time the Commission first became aware of the problem.[21] It would have been pointless to consider the institution of revocation proceedings when the end of the license period was so near at hand. In any event, there is no reason why the Commission should not wait until the end of a license period to review a licensee's operations, when there is no necessity for, or point to, immediate revocation proceedings. The choice of remedies has been entrusted by Congress to the Commission, and that discretion was in no way abused here.

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20 / Robinson's further contention (Br. 46) that the time elapsing between the Commission's awareness of the nature of the operation of the station and the time when the renewal was designated for hearing, shows that the Commission trapped Robinson, is difficult to follow. The Commission's letter of May 11, 1960 (R. 211) advised Robinson of the complaints received by the Commission, and requested a statement with respect to the matter. If Robinson misrepresented the facts in replying to this letter, the subsequent designation of his renewal application for hearing on that question does not show entrapment or a denial of the privilege against self-incrimination.

21 / Additionally, of course, the Commission's investigation took further time.

Finally, although Robinson now challenges the Commission's authority to consider the Charlie Walker programs, it may be noted that no such challenge was made in 1960 when Robinson denied knowledge of the nature of the broadcasts. Whatever Robinson may have thought of the propriety of the Commission's inquiry, he made no objection, and it was not open to him to purport to make a full reply which was in fact a deliberate misrepresentation. The "fact of concealment" is itself decisive. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223; Charles P. B. Pinson, Inc. v. Federal Communications Commission, ____ U.S. App. D.C. ____, _____ F.2d ____ (decided June 13, 1963).

II. THE COMMISSION PROPERLY CONCLUDED THAT THE LICENSEE'S RENEWAL APPLICATION SHOULD BE DENIED BECAUSE IT HAD DEVOTED A SUBSTANTIAL AMOUNT OF THE STATION'S BROADCAST TIME TO PROGRAMMING WHICH WAS PATENTLY COARSE, VULGAR, SUGGESTIVE AND SUSCEPTIBLE ON INDECENT DOUBLE MEANING, AND HAD FAILED TO SHOW THAT THIS PROGRAMMING SERVED THE NEEDS OF THE AREA OR THE PUBLIC INTEREST. THE BASIS FOR DECISION WAS WITHIN THE COMMISSION'S CONSTITUTIONAL AND STATUTORY AUTHORITY AND WAS MADE PURSUANT TO A SUFFICIENT STANDARD IN THE CIRCUMSTANCES OF THIS CASE.

INTRODUCTION

The primary contention of appellant is that the Commission lacked the power to take any account of the broadcast by station WDKD of a substantial amount of programming which was patently coarse, vulgar, suggestive and susceptible of indecent double meaning. Appellant claims apparently (Br. 10-12, 16, 23-26) that any consideration of program content in a licensing scheme abridges the free speech guaranty of the First Amendment and constitutes censorship prohibited by Section 326 of the Communications Act, 47 U.S.C. 326, unless the programming lies beyond the protection of the First Amendment.

The brief amicus of the American Civil Liberties Union (ACLU) concedes (Br. 9, 14) that the Commission may constitutionally require a license as a prerequisite to broadcasting, and further that the Commission may require a showing that the applicant had rendered or will render a service which furthers the public interest. The ACLU urges, however (Br. 14-29), that the Commission's action in this case is constitutionally

infirm for lack of a clear and unambiguous standard on objectionable program content. 22/

In light of the broad attack made by appellant upon the Commission's authority to consider a station's service to the public, it is important to make clear at the outset the exact basis of the Commission's decision and the nature of appellant's attack upon it. The Commission determined that a renewal of license would not serve the public interest where a substantial portion of the station's program service over a long period of time was devoted to a program consistently containing "dirty jokes" which were "flagrantly offensive" by any standard (R. 1424-1425, 1583-1584). 23/ The decision was based (R. 1583) upon examination of the material, Robinson's own admissions, and the testimony of responsible local witnesses. The decision was made with every allowance for the licensee's judgment (R. 1424, 1583).

22/ We believe that there is no necessity for the Court to reach these constitutional questions in the event it sustains the Commission's determination that the licensee's misrepresentations independently warranted denial of its renewal application (Point I, supra). Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 228-229.

23/ The Commission did not find that the Charlie Walker material was "obscene" or "indecent" within the meaning of 18 U.S.C. 1464, or beyond the protection of the First Amendment. Since Issue 3 was not drawn in terms of violation of Section 1464 or of "obscenity", the Commission did not rule on the question, although it stated its view that the terms used in Issue 3 "coarse, vulgar, suggestive, and susceptible of indecent, double meaning" could not be equated with "obscene" or "indecent" (R. 1422). As the Commission pointed out, however (R. 1422, 1423), it would clearly have authority to consider, under the public interest standard, activities which might also be violative of Federal laws or policies. Federal Communications Commission v. American Broadcasting Co., 347 U.S. 284, 289, fn. 7; United States v. Radio Corporation of America, 358 U.S. 334, 351-353; National Broadcasting Co. v. United States, 319 U.S. 190, 223; Mansfield Journal Co. v. Federal Communications Commission, 86 U.S. App. D.C. 102, 107-108, 180 F.2d 28, 33-34; and cf., also, Southern Steamship Co. v. National Labor Relations Board, 316 U.S. 31, 47.

It is also important to note that the Commission action challenged here is its holding a licensee to account for his use of a frequency. There was no attempt to require the licensee to submit any material to the Commission in advance in order that it be censored before being broadcast. The question is purely one of subsequent accountability.

Furthermore, as the Commission made clear (R. 1425, 1583), it was not denying the renewal of license because of a few isolated items, but because "the record reasonably establishes, and we so find, that this was the manner in which the station was operated for a substantial period of its broadcast day over many years. Thus, we are not saying that a single off-color joke or program suffices to taint an entire operation. That question is clearly not presented by the record before us. We are saying that this licensee's devotion of so substantial a portion of broadcast time to the type of programming set forth in the Examiner's Initial Decision is inconsistent with the public interest and, indeed, represents an intolerable waste of the only operating broadcast facilities in the community -- facilities which were granted to this licensee to meet the needs and interests of the Kingstree area."

Moreover, there is no serious claim by the licensee or by the ACLU that the Charlie Walker material, viewed as a whole, was not offensive,[24/] that it was of artistic merit, or that it served the needs of the service area or the public interest. The Commission properly noted that (R. 1583):

24/ Appellant concedes (Br. 28) that "to some members of this Court, certain of the material included in FCC Exhibit 2 (see R. 890-895) will no doubt be viewed as highly offensive. . ."

> Robinson himself, when confronted with some of the broadcasts by Charlie Walker, described them as suggestive, vulgar and of an uncouth nature. He discharged Walker and stated to the Commission that he had taken steps to prevent recurrence of such offensive programming. In short, the licensee himself has not claimed that this programming was not vulgar and offensive; nor has he ever asserted that it served the needs of his area or had redeeming features.
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> * * *
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> Although petitioner [Robinson] had full opportunity to do so and indeed had the burden of proof in this respect, he did not present any evidence that this programming was not offensive or that it in some way served the needs of the area.

Since appellant's position before the Commission was that it would not have knowingly broadcast the Charlie Walker material (R. 1420-1421), and since appellant did not (except perhaps for the nicknames for towns) defend the material on the merits, or show that it was attempting to serve the public interest by the broadcast of such material, the Commission was not ruling upon any claim that the material, although controversial, nevertheless served the public's interest.[25/] The Commission thus was not presented with the question of whether the same or similar material would be contrary to the public interest if presented in the context of programs of an informational or dramatic nature, e.g., science or news programs, plays, or movies.[26/] Indeed, the Commission made clear (R. 1582)

25/ The Commission's policy with respect to controversial issues of public importance is to require a fair presentation of conflicting views. Editorializing by Broadcast Licensees, 14 Fed. Reg. 3055 (June 7, 1949). This policy has been implicitly approved by the Supreme Court and Congress. Farmers Union v. WDAY, 360 U.S. 525, 534, fn. 17; Public Law 86-274, 73 Stat. 557, amending Section 315(a) of the Communications Act to recognize this standard.

26/ The Commission properly rejected appellant's assertion, made by way of excuse, that the Charlie Walker material should be dismissed as mere "buffoonery and attempted buccolic badinage" (R. 1425).

that the test it applied here was not applicable "to other types of programming -- e.g., religious or controversial issue broadcasts -- that may happen to offend some segment of the public."

Neither appellant itself, nor the ACLU, takes the position that the operation of WDXD warranted a renewal of license under the public interest standard prescribed by Congress. Appellant, despite this Court's statement with respect to a comparative licensing proceeding,[27] that "comparative service to the listening public is the vital element, and programs are the essence of that service," Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 48, 175 F.2d 351, 359, bases its entire argument on the proposition that program service is the one aspect of a station's operation which the Commission may not validly consider. This challenge goes to the root of the Commission's authority to determine whether a trustee[28] of a scarce national resource has exercised his trusteeship consistently with the public interest. The ACLU, while agreeing with the Commission that (Br. 14) "the government can condition a license upon the station operator rendering a service which furthers the public interest," nevertheless believes that the Commission's standard enunciated in its decision was fatally vague. We shall discuss these respective arguments in points A and B below.

27/ While appellant appears to make a point of limiting its discussion to non-comparative proceedings (Br. 10, 27, 32), it nowhere suggests why the Commission's authority varies between comparative and non-comparative cases.

28/ "It is plain * * *that a radio broadcasting station must operate in the public interest and must be considered a 'trustee' for the public." McIntire v. Penn Broadcasting Co., 151 F.2d 597, 599 (C.A.3, 1945); Television Corp. of Michigan v. Federal Communications Commission, 111 U.S. U.S. App. D.C. 101, 104-105, 294 F.2d 730, 733-734.

A. The Communications Act Fully Authorizes The Commission To Determine Whether A License Has Been Used In The Public Interest

The authority of the Commission to require an applicant to show that it has rendered or will render a service which is compatible with the statutory standard of "public interest, convenience, and necessity", 47 U.S.C. 307, 308, 309, is by this time established beyond doubt. As the Attorney General of the United States noted in a report to the President in 1959 (Report to the President by the Attorney General on Deceptive Practices in Broadcasting Media, 19 Pike & Fischer, Radio Regulation 1901, 1920-21), this authority has been consistently upheld by the courts in every one of the numerous decisions dealing with the question. For, throughout the long history of the Commission's constant concern with the program policies, plans and practices of licensees, no action by the Commission in this field has ever been held to be beyond its authority[29/] or to violate the constitutional protection of freedom of speech or of the press. Despite an overwhelming array of rulings directly on the issue and contrary to its position, appellant urges (Br. 13) that two decisions of this Court, squarely sustaining the Federal Radio Commission's authority to consider program content upon application for renewal of license, are no longer sound, and that its operation, however inadequate, was beyond the Commission's reach. The contention is unfounded.

29/ In Federal Communications Commission v. American Broadcasting Co., 347 U.S. 284, where the Supreme Court struck down part of the Commission's lottery rules, which were based entirely upon the prohibition of the broadcast of lotteries in 18 U.S.C. 1304, because the rules did not correctly interpret the statute, the Court directly sustained the Commission's power to deny a license for violation of the lottery statute.

The Communications Act prohibits the transmission of signals by radio without a license issued by the Commission (Section 301, 47 U.S.C. 301).[30] The Commission may issue a license (or construction permit) only if the public interest, convenience, or necessity will be served thereby (Sections 307(a), 309(a), 47 U.S.C. 307(a), 309(a)). The license may then only be issued for a maximum of three years (Section 307(d), 47 U.S.C. 307(d)), and renewals may be granted only upon a finding that "public interest, convenience, and necessity would be served thereby" (Section 307(d)). The Act thus establishes a system of private ownership of broadcast stations to be operated under government license consistently with paramount public interest.[31]

In addition, Section 303 of the Communications Act, 47 U.S.C. 303, grants to the Commission broad authority to regulate the use of radio frequencies as the "public convenience, interest, or necessity requires." On the basis of this criterion, the Commission is empowered,

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30/ Section 301 also provides:

> "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."

See also Transcontinent Television Corp. v. Federal Communications Commission, 113 U.S. App. D.C. 384, 308 F.2d 339.

31/ Thus where the grant of a new license may cause financial competitive injury to an existing station, this injury is not cause for denial unless it results in public injury. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470; Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440. See also Scripps Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4, 14.

inter alia, to: "Classify radio stations"; "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class";"[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest"; "[m]ake general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable"; and "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *". Sections 303(a), (b), (g), (j), and (r), 47 U.S.C. 303(a), (b), (g), (j), and (r). See also, Section 4(i), 47 U.S.C. 154(i), which authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions".

The privilege of broadcasting to the public is by its very nature not available to all who desire it. In granting this privilege, the Government is entitled, as former President Hoover put it when Secretary of Commerce, to compel the applicant "to prove that there is something more than naked commercial selfishness in his purpose".[32/] The standard of the public interest incorporates that view. It was first applied to federal radio regulation in the Radio Act of 1927,

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32/ Address of Herbert Hoover, as Secretary of Commerce, before the Fourth National Radio Conference on November 9, 1925, published in Proceedings of the Fourth National Radio Conference (Government Printing Office, 1926), p. 7.

44 Stat. 1162, 47 U.S.C. Section 81, et seq., and was continued in the Communications Act of 1934 with substantially the same objectives. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 137. The legislative history underlying the adoption of this standard, and the judicial interpretation accorded it by this Court and by the Supreme Court of the United States, demonstrate that, from its initial adoption, there was general understanding that emphasis was to be given to the convenience, interest, and necessity of the listening public rather than that of the individual broadcaster; 33/ and, further, that primary consideration was to be given to the content and quality of program service in the award of broadcast licenses and the renewal of the same. The Federal Radio Commission so interpreted the law, see, e.g., Great Lakes Broadcasting Co., Third Annual Report of Federal Radio Commission, pp. 33-35, as did this Court.

The authority of the Federal Radio Commission to consider program content in denying a renewal of a broadcast license was established by this Court some thirty years ago in KFKB Broadcasting Assn. v. Federal Radio Commission, 60 App. D.C. 79, 81, 47 F.2d 670, 672, where the Court pointed out:

> * * *It is apparent, we think, that the business [of broadcasting] is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of license,

33/ Hearings before the Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess., p. 84. See also Second Annual Report, Federal Radio Commission, 1928, pp. 169-170; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138-139, note 2.

> an important consideration is the past conduct of the applicant, for "by their fruits ye shall know them." Matt. VII: 20.

To the same effect was Trinity Methodist Church, South v. Federal Radio Commission, 61 App. D.C. 311, 62 F.2d 850, cert. denied 284 U.S. 685.[34] These decisions on the renewal of licenses, which are subject to the same standard as the grant of initial licenses, are clearly directly in point here, as appellant concedes (Br. 13). They have since been confirmed, rather than eroded.

At the time the Communications Act of 1934 was enacted,[35] Congress had been repeatedly advised of the Federal Radio Commission's

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34/ The entire judicial history of the Radio Act of 1927 shows that this Court repeatedly assumed that the content and quality of program service was a prime consideration in the allocation of power, time of operation and frequency. City of New York v. Federal Radio Commission, 59 App. D.C. 129, 36 F.2d 115, cert. denied 281 U.S. 729; Great Lakes Broadcasting Co. v. Federal Radio Commission, 59 App. D.C. 197, 37 F.2d 993, 995, cert. dismissed 281 U.S. 706; Chicago Federation of Labor v. Federal Radio Commission, 59 App. D.C. 333, 41 F.2d 422; Woodmen of the World Life Insurance Assn. v. Federal Radio Commission, 61 App. D.C. 54, 57 F.2d 420; Radio Investment Co. v. Federal Radio Commission, 61 App. D.C. 296, 62 F.2d 381, cert. denied 288 U.S. 612; Unity School of Christianity v. Federal Radio Commission, 63 App. D.C. 84, 69 F.2d 570, cert. denied 292 U.S. 646.

35/ It may also be emphasized that, from the very beginning of its operation, the Federal Radio Commission, and, subsequently, the Federal Communications Commission, required all applicants for broadcast licenses and renewals of such licenses to submit statements of their proposed program policies, and based the decision whether to grant or deny the application in whole or in part on a determination as to whether the proposed programming was or was not in the public interest. See Statement made by the Commission on August 23, 1928, relative to public interest, convenience or necessity, quoted in Second Annual Report of the Federal Radio Commission, pp. 166-170; Programming Policy Statement, 20 Pike & Fischer, Radio Regulation 1901, 1916, and the Notice of Proposed Rule Making in Docket No. 12673, initiating a proceeding on November 24, 1958, to make revisions in the Commission's rules prescribing the form and content of reports on broadcast programming (23 Fed. Reg. 9298).

policy of considering the program plans and records of applicants for broadcast licenses.[36] Congress also had been specifically informed of the import of the KFKB Broadcasting Assn. case, supra,[37] Nevertheless, in the course of the enactment of the Communications Act of 1934, which took over the public interest standards of the Radio Act unchanged, no suggestion was made by any person, either in the hearings or in any of the debates, that the Commission did not or should not have power to consider an applicant's program policy or record in determining whether a grant of license would serve the public interest.[38]

36/ This information had been furnished to Congress by means of the Commission's Annual Reports to Congress and in the course of various Congressional hearings. See 1st-7th Annual Reports of the Federal Radio Commission (1927-1933); Hearings on Jurisdiction of the Radio Commission, before House Committee on Merchant Marine and Fisheries, 70th Cong., 1st Sess., 1928, pp. 26, 188; Hearings on S. 6, before Senate Committee on Interstate Commerce, 71st Cong., 1st Sess., 1929-1930, pp. 77, 88-90, 157, 230, 1615-1616.

37/ The effect of the KFKB case was the subject of specific comment on the floor of the House during the passage of H.R. 7716 in the 72nd Congress, 75 Cong. Rec. 3682, 3684.

38/ In fact, in the Hearings on H.R. 8301, before the House Committee on Interstate Commerce, 73rd Cong., 2d Sess., one of the bills which eventually culminated in the Communications Act of 1934, the National Association of Broadcasters submitted a statement containing the following remarks (p. 117):

> "It is the manifest duty of the licensing authority, in passing upon applications for licenses or the renewal thereof, to determine whether or not the applicant is rendering or can render an adequate public service. Such service necessarily includes broadcasting of a considerable proportion of programs devoted to education, religion, labor, agricultural and similar activities concerned with human betterment. In actual practice over a period of 7 years, as the records of the Federal Radio Commission amply prove, this has been the principal test which the Commission has applied in dealing with broadcasting applications."

Subsequently, in connection with a 1947 proposed amendment of Section 307(b) of the Act (which was never adopted), the Chairman of the Senate Committee on Interstate and Foreign Commerce, Senator Wallace H. White, Jr., made it clear that it was the Congressional understanding that the Commission possessed authority to consider program character and quality, when he stated (Hearings on S. 1333 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess., p. 124):

> But having in mind that we are to retain in the law something which is based upon the requirement that public service is being rendered, or is to be rendered, it almost seems that we must throw all of that into the deep sea unless, in determining whether a public service is being rendered, or is going to be rendered, you can appraise and evaluate the programs that go out over the air.
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> It seems to me that that is the largest factor there is determining whether a service is being rendered or is not being rendered.
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> * * *However, somebody has got to explain to me and bring conviction to me that the quality and the character of programs do not enter into, as a prime factor, a determination of whether a station is performing a public service. If you say that that has nothing to do with the problem, then I say you might just as well scrap all this radio law, and go back to where we were in 1926.

In the administration of the Communications Act, the Commission has, in accordance with the views expressed by Senator White, continued the policy of considering the program proposals of applicants for licenses, and has required that applicants make a showing that they will so operate their stations as to insure that their program service

will meet the particular needs and interests of the community or area they propose to serve. Consistent with this requirement, the Commission has denied applications for station licenses, even where the particular community in question had no local broadcast service, on the grounds that the applicant was not a resident of the community, possessed no knowledge of its needs, and had submitted program proposals which failed to show any substantial concern with the interests or needs of the community. Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191, cert. denied 371 U.S. 821. 39/

Since the adoption of the Communications Act, the courts have, without exception, sustained the Commission's right to insist upon an adequate use of a station in the public's interest. In Simmons v. Federal Communications Commission, 83 U.S. App. D.C. 262, 169 F.2d 670, cert. denied 335 U.S. 846, this Court affirmed the Commission's decision that the public interest would not be served by an increase of power for a radio station which the Commission had found would act as a mere "network funnel" for program material piped in from outside the community. The Court upheld the Commission's denial of the application on the ground that the local interests of the listening community would not be adequately served by the applicant's program policy. See also Bay State Beacon, Inc. v. Federal Communications Commission, 84 U.S. App. D.C. 216 171 F.2d 826; Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F.2d 351;

39/ Brownsville Broadcasting Company, 2 F.C.C. 336, 340; Sanders, 2 F.C.C. 365, 372; Paris Broadcasting Company, 2 F.C.C. 422, 424-425; Martin, 3 F.C.C. 461; Goldwasser, 4 F.C.C. 223; Woodard, 4 F.C.C. 313, 314; Kraft, 4 F.C.C. 354; Egeland, 6 F.C.C. 278, 280-281 (the Henry case supra, and the Brownsville, Martin, Goldwasser, and Kraft cases did not involve competing applicants).

Plains Radio Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 48, 175 F.2d 359; W. S. Butterfield Theatres, Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 71, 237 F.2d 552.

This Court has recently stated in Great Lakes Broadcasting Co. v. Federal Communications Commission, 110 U.S. App. D.C. 88, 89, 289 F.2d 754, 755, that:

> * * *The Commission asserts that its function with respect to program proposals is to ascertain whether the applicants' over-all program balance and structure meet the needs of the service area and whether the applicants have made an effort to determine these needs, and that it is required to make a detailed comparison of individual programs only in cases where significant differences in entire fields of programming are made to appear. We cannot say that this view of the Commission's role is unreasonable or otherwise precluded by the Act.

The Court then added this footnote:

> Of course, if it should appear to the Commission that the program proposals of no applicant meet the needs of the service area and that, consequently, the award of a license would not be in the public interest, the Commission may not grant a license to any of the applicants.

Similarly, in Connecticut Committee Against Pay TV, et al. v. Federal Communications Commission, 112 U.S. App. D.C. 248, 251, 301 F.2d 835, 838, cert. denied 371 U.S. 816, this Court stated:

> The Commission has declared its determination to oversee carefully the form which programming takes under the subscription system. Surely its power to see that this area of the public domain is used in the public interest is not less for 'paid' television than for the existing system of so-called 'free' television. While it is reasonable not to require the licensee to commit itself now to definite named programs until the wishes of the subscribers have been more completely sounded, and the potential sources of program material more fully explored, nevertheless it seems to us imperative that the licensee be held to adhere faithfully to the high standard of programming which it has

> promised. To say that the Commission cannot exercise supervision to that end would denude the experiment of its creative potentialities and dilute the Commission's power to make a final appraisal when the experiment is completed.

See also, Noe v. Federal Communications Commission, 104 U.S. App. D.C. 221, 225, 260 F.2d 739, 743, cert. denied, 359 U.S. 924.

Appellant's suggestion that the Commission is restricted to examination of its legal, technical and financial qualifications has already been precluded by the Supreme Court in National Broadcasting Co. v. United States, 319 U.S. 190, 215-216, where the Court stated:

> The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.
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> The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio" * * *. The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." Federal Communications Commission v. Sanders Radio Station, 309 U.S. 470, 475. The Commission's licensing function cannot be discharged, therefore merely by finding that there are no technological objections to the granting of a license * * *. [Emphasis supplied.] 40/

40/ The Supreme Court also stated in Regents of the University System of Georgia v. Carroll, 338 U.S. 586, 598:

> "Although the licensee's business as such is not regulated, the qualifications of the licensee and
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> (cont'd)

Moreover, contrary to appellant's contention (Br. 16-22), the denial of a license upon a ground reasonably related to the public interest, including the past (or proposed) service rendered the public, is neither censorship within the meaning of Section 326 of the Communications Act[41] nor an abridgment of the right of free speech. The Supreme Court thus stated in National Broadcasting Co. v. United States, 319 U.S. 190, 226:

> We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to

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40/ (cont'd)
the character of its broadcasts may be weighed in determining whether or not to grant a license."

And in Farmers Union v. WDAY, 360 U.S. 525, 534-535, the Supreme Court relied on the circumstance that "the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit."

41/ Section 326 provides:

> "Nothing in this Act shall be understood or construed to give the Commission the power of consorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

> persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

The decisions of this Court are precisely to the same effect. See Simmons v. Federal Communications Commission, 83 U.S. App. D.C. 262, 264, 169 F.2d 670, 672, cert. denied 335 U.S. 846; Johnston Broadcasting Company v. Federal Communications Commission, 85 U.S. App. D.C. 40, 48, 175 F.2d 351, 359; Bay State Beacon, Inc. v. Federal Communications Commission, 84 U.S. App. D.C. 216, 217, 171 F.2d 826, 827; Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 259-260, 302 F.2d 191, 193-194, cert. denied 371 U.S. 821. In the Johnston case, this Court stated (85 U.S. App. D.C. at 48, 175 F.2d at 359):

> As to appellant's contention that the Commission's consideration of the proposed programs was a form of censorship, it is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (except for prohibitions against obscenity, profanity, etc.), it can make a comparison on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship within the meaning of the statute. As we read the Commission's findings, the nature of the views of the applicants was no part of the consideration. The nature of the programs was.

Appellant has not shown that these rulings are any less applicable today. Despite the increase in the number of competitive broadcast outlets in recent years, the radio spectrum remains inadequate to accommodate all who seek to use it.[42/] The necessity of protecting the public's

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42/ See Annual Report of the Federal Communications Commission for 1959, pp. 159-160. See also Bendix Aviation Corp. v. Federal Communications Commission, 106 U.S. App. D.C. 304, 272 F.2d 533, cert. denied sub nom. Aeronautical Radio, Inc. v. United States, 361 U.S. 965, for an example of the difficult problems still arising from an inadequacy of spectrum space. That no other applicant is presently seeking to utilize appellant's frequency in Kingstree, does not remove the possibility that a better applicant might be forthcoming if the denial of appellant's application is sustained. Moreover, in the broader sense, the Commission is always required to evaluate the use of which broadcast frequencies are being put in determining whether the public interest might not be better served by the allocation of such frequencies for the use of other services, pursuant to the Commission's powers under Section 303 of the Communications Act, supra, pp39-40 . The loss to the public would indeed be grave if the caliber of service provided on the broadcast frequencies (with all their entertainment and educational potential) were to fall so low that it might be determined that these frequencies would be less wastefully utilized by being allocated to meet presently increasing industrial and technological needs for spectrum space.

interest in the use of scarce frequencies in the public domain has not lessened since 1943. 43/

43/ See e.g., Senate Report No. 49, submitted by a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess., on the subject, "Communications Study". In this Report, which was unanimously approved and adopted by the full Committee on February 9, 1949, the following lucid analysis of the censorship issue was set forth (pp. 12-13):

> "Your subcommittee deems it wise to make some reference in this report to the frequently discussed so-called censorship question. We had thought that the views of this committee, as a whole, were firmly and cogently expressed in the report on the White bill (S. Rept. 1567, 80th Cong.). There has been, however, repeated reference to Commission interpretations of the act as limiting free speech or imposing censorship on radio licensees. It is apparent to your subcommittee that a planned propaganda effort is being carried on among well-meaning but uninformed persons to secure congressional revision of the act with respect to the so-called censorship question.
>
> "It should be pointed out that the act itself contains a "no censorship" section (sec. 326) which makes clear that there can be no censorship of radio programs. The language itself is brief. It states plainly that the Commission does not have the power of censorship over radio communications and that it shall not make any rule or condition which shall interfere with the right of free speech by radio. There are no "if's", "and's", or "but's", no weasel words or hidden clauses. What has provoked certain radio interests is Commission interpretation of its licensing and licensing-renewal power (sec. 309) which declares that the Commission must determine that the granting of a license or renewal is in the public interest, convenience, and necessity. The Commission has, from time to time, exercised this latter authority by withholding or denying renewals until it determined that the licensee had operated in the public interest.
>
> "Probably no other provision of the law has been attacked in the courts more frequently and by more able legal counsel. Probably no other section of the law has been subject to more searching scrutiny by the courts, including the Supreme Court of the United States. Uniformly and without exception, the final decision has upheld the Commission's authority to determine whether or not a licensee's operation has been in the public interest. Moreover, the court decisions have held that such exercise of authority by the Commission does not invade or vitiate the "no censorship" provision of the law. When the courts have on more than one occasion spoken clearly that the Commission has the right and duty under the law to determine whether the public interest is being served and that (cont'd)

Appellant's contention (Br. 13-33) that this Court's earlier decisions in Trinity Methodist Church, South v. Federal Radio Commission, 61 App. D.C. 311, 62 F.2d 850, cert. denied 284 U.S. 685, 288 U.S. 599, and KFKB Broadcasting Ass'n v. Federal Radio Commission, 60 App. D.C. 79, 47 F.2d 670, are no longer sound in light of more recent pronouncements of the Supreme Court in fields other than broadcasting, is therefore made with no regard to the later rulings of either that Court or this Court in the radio field. It flows essentially from its mistaken view that the safeguards of the First Amendment work in the broadcast field in precisely the same fashion as in other media of expression. This view leads it to insist that the Commission may not consider program content under the public interest standard of the Communications Act unless the material is beyond the protection of the First Amendment. But no case holds for radio, as appellant broadly claims (Br. 10), that any examination of program content under a public interest standard contravenes the First Amendment.

It is undisputed that the protection of the First Amendment extends to broadcasting and to entertainment programs. Section 326 of the Communications Act; Winters v. New York, 333 U.S. 507, 510; United States v. Paramount Pictures, Inc., 334 U.S. 131, 166; Superior Films, Inc. v. Department of Education of State of Ohio, 346 U.S. 587, 589.

43/ (cont'd)
in so doing there is no violation of free speech, we believe the final judicial interpretation has been made.

"We concur, of course, completely and fully with the line of judicial decisions on this point. To us it appears ridiculous to hold that a person operating under a Federal license shall not be answerable to a constituted authority for his performance under that license. To hold otherwise would be to set at naught the license system, to make the license in fact a perpetual grant. So long as radio frequencies are scarce national resources, the Government has a right to expect and demand proper use of them."

The Commission always recognized and here recognized "the great importance of the First Amendment and censorship (Section 326) considerations" (R. 1424). See also Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 Pike & Fischer, R.R. 1901, 1905-1912.

However, as the Supreme Court has stated, different rules and standards may be appropriate for different media of expression in view of their differing natures. As it stated in Burstyn v. Wilson, 343 U.S. 495, 502-503:

> To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas.. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.

See also the concurring statement of Justice Frankfurter in Kovacs v. Cooper, 336 U.S. 77, 96, that:[44/]

> It is argued that the Constitution protects freedom of speech: freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communication; ergo that form is entitled to the same protection as any other means of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories. The various forms of modern so-call

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44/ Justice Jackson, concurring in the Kovacs case, stated (336 U.S. at 97):

> "I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of "communication of ideas." The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck."

> "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. Cf. Associated Press v. United States, 326 U.S. 1. Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated. Mutual Film Corporation v. Industrial Commission, 236 U.S. 230. Broadcasting in turn has produced its brood of complicated problems hardly to be solved by an easy formula about the preferred position of free speech. See National Broadcasting Co. v. United States, 319 U.S. 190.

As we have shown, the courts have already established that the Commission's concern with program content in granting or renewing licenses does not stop with a decision that the material falls within the protection of the First Amendment; it necessarily extends also to consideration of whether the programming serves the public interest. While the "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the mode of expression, there is in the broadcast field a "permissible scope of community control" (Burstyn v. Wilson, 343 U.S. 495). No applicant for a license under the Communications Act has an unlimited right to a grant "merely because of the First Amendment. * * * The public interest must be served." Borrow v. Federal Communications Commission, 109 U.S. App. D.C. 224, 228, 285 F.2d 666, 670, cert. denied, 364 U.S. 892.

The courts have thus already made a distinction between radio and other forms of speech, and have approved the standard of the public interest for radio, although this standard might be inappropriate in other fields. It is a standard appropriate to a medium which inherently is not available to all. National Broadcasting Co. v. United States, 319 U.S. 190. The test of the public interest, convenience and necessity prescribed by Congress for all uses of radio has too often been sustained

as valid to permit appellant's argument (Br. 23-26) that programming clearly contrary to the public interest is nevertheless beyond the Commission's reach.[45/]

Finally, appellant's contention (Br. 21-22) that the statutory public interest standard, while adequate in other respects, is too vague when applied to programming, is equally unfounded. The authorities already cited establish the constitutional validity of the application of this standard to questions other than the electrical interference problems to which appellant would limit its permissible application (Br. 22). See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190; Simmons v. Federal Communications Commission, 83 U.S. App. D.C. 262, 169 F.2d 670, cert. denied 335 U.S. 846.

Appellant's authorities (Br. 21-23) holding that administrative officials may be given no discretion to prohibit speech, are thus inapplicable to the field of radio. In contrast to other modes of expression denial of access to radio as a means of communication to the public has been held by the Supreme Court to be validly accomplished under a public interest standard which provides for administrative discretion. Federal Radio Commission v. Nelson Brothers Co., 289 U.S. 266; National Broadcasting

45/ We need not disagree with appellant's contentions that the First Amendment protects entertainment programs (Br. 14), that the need for licensing does not remove the functions of the First Amendment (Br. 15), that the Commission does not have carte blanche authority (Br. 16), that the Commission may not merely "impose its own program views and tastes" (Br. 16), that the First Amendment protects speech from subsequent punishment as well as previous restraint (Br. 17), that the previous restraints generally are frowned upon (Br. 18), or that censorship through licensing of speech by administrative agencies is generally undesirable (Br. 18-23). But these arguments do not take any account of the established law in the broadcast field.

Co. v. United States, 319 U.S. 190. Since this is so, no purpose would be served by requiring of Congress a probably impossible specificity of standard for action by the Commission with respect to one area of its public interest determinations, while leaving it wide discretion to formulate standards with respect to other criteria upon which a denial of license may validly be based.

Appellant's argument on this point is thus an attempt to import into the radio field from other fields general principles which have been rejected by the courts as inappropriate. Compare Schneider v. State, 308 U.S. 147, cited by appellant as holding that a police official may not deny access to the streets to a canvasser who is not of good character, with Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, holding that misrepresentation is a ground for denial of a broadcast license. We do not urge that the Commission's discretion in the area of programming is absolute or unbounded. We do urge that once the basic principle of Congressional authority to require operation in the public interest as determined by the Commission is accepted, the "public interest" standard, considered in the context of the radio medium, provides an adequate standard for Commission action and for judicial review in the program field. No experience to date suggests the contrary, and appellant has given no reason why the standard should now be rejected as inadequate.

B. The Standard Set Forth by the Commission was Proper in the Circumstances of this Case

The ACLU challenges the standard under which the Commission decided the Charlie Walker portion of this case. While recognizing that the statutory standard is sufficient to justify Commission consideration of program service, the ACLU, as amicus curiae, urges that the Commission's particularization of that standard in this case is too vague and ambiguous to be constitutional, and that it will have deleterious effects upon creative programming by broadcasters to the detriment of the public interest. For the reasons set forth below, we believe that the Commission's standard is sufficiently clear and precise under the circumstances here, and is reasonably related to important public interest considerations of proper concern to the Commission.

The Commission expressed itself in the following terms (R. 1424-1425):

> We do not slough aside the argument advanced here by WDKD. On the contrary, we recognize the great importance of the First Amendment and censorship (Section 326) considerations here. Programming Statement of July 29, 1960, supra; U. S. v. Paramount Pictures, 334 U.S. 131, 166; Superior Films, Inc. v. Department of Education of State of Ohio, 346 U.S. 587, 589. But this does not mean that the Commission has no authority to act under the public interest standard. Rather, it means that the Commission cannot substitute its taste for that of the broadcaster or his public - - that it cannot set itself up as a national arbiter of taste. Such wholly improper action by the Commission would be disastrous to our system of broadcasting and would not be tolerated by the courts or by the Congress. Turning to the specific issue before us, this means that we cannot decide that some pattern of broadcasts is "vulgar", "suggestive", "coarse", and "susceptible of indecent, double meaning" on the basis of our own taste or preference for what we believe should be broadcast. What we must find is that the broadcasts in question are flagrantly offensive--that by any standard, however reasonably weighted for the licensee, taking into account the record evidence, the broadcasts are obviously offensive or patently vulgar. In short, the licensee necessarily and properly has wide discretion in choosing every type of programming to be broadcast

> to meet the needs and interests of the public in his area. Programming Statement of July 29, 1960. It follows that in dealing with the issue before us, we cannot act to deny renewal where the matter is a close one, susceptible to reasonable interpretation either way. We can only act where the record evidence establishes a patently offensive course of broadcasts. It is, we think, incorrect to say that in so acting under the public interest standard, the Commission poses any danger to free expression in the broadcasting field. Our whole history establishes that this is not so -- that we have acted with great circumspection in this sensitive area, and that where the drastic action of denial of renewal has been used, it has been because the situation itself was a drastic or flagrant one. In the circumstances, we think that the greater danger to broadcasting would be in our failure to protect the public interest; and we note that there is evidence in the record by local broadcasters which would support that conclusion (pars. 34-35, Initial Decision). [See R. 888]

We think it clear that the Commission, in concerning itself with the Charlie Walker programs, was concerned with conduct in which it had a legitimate interest.[46/] If, as the ACLU agrees, a station's operation must serve the public interest, it would seem to follow that the Commission has a legitimate concern with a pattern of operation which neither the ACLU nor the licensee himself is willing to defend as in the public interest. The Commission found that appellant had never asserted, or presented any evidence to show, that the Charlie Walker material was not offensive or that it in some way served the needs of the service area (R. 1583). The ACLU apparently believes the Charlie Walker material to be of "minimal value" (Br. 28). In addition, representatives of the South Carolina Broadcasters Association testified that they feared the Charlie Walker programs would generate competitive pressure on other stations to

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46/ The ACLU submits this formulation as one of the two tests Commission action must meet (Br. 14, 21), and it suggests that the Commission failed to meet that test here, but it nowhere expands upon the mere recitation of the point.

lower their standards of quality because it is "easy to peddle smut." (See R. 888). Misuse of a public trust is the issue, and if misuse was properly found, relevance to a statutory objective cannot be doubted.

The Commission's concern with the sensibilities of the housewife, teen-ager, and the young child (to which the ACLU objects, Br. 11) has a legitimate basis in the context of radio broadcasting, and particularly in the case of disc jockey patter. As the Commission noted (R. 1423, 1582), record-disc jockey type of entertainment constitutes as much as 75% or 80% of the broadcast day of many radio stations, and the Charlie Walker shows constituted 25% of appellant's broadcast day (R. 1425). As the Commission recognized (R. 1582), "because of the special nature of the broadcast medium, * * * the listeners in the home or car (including children) might be subjected to such material simply by having left the set tuned to a particular frequency or station (e.g., WDKD, the only station in Kingstree) or in turning the dial", and hence might be unable to avoid such material except by foregoing radio altogether. Moreover, in this day of roving transistor radios and radio programming on public conveyances, it might prove impossible to carry on normal affairs and escape such disc jockey patter. Compare Kovacks v. Cooper, 336 U.S. 77, 86-87: "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality."

This Court has had occasion to comment (Television Corp. of Michigan v. Federal Communications Commission, 111 U.S. App. D.C. 101, 104-105, 294 F.2d 730, 733-734) that:

> All too often in cases like the present the broadcasters involved appear to be chiefly interested in the revenues to be derived from operating their stations in the most profitable manner. * * * Television and radio are affected with a public interest: the Nation allows its air waves to be used as a matter of privilege rather than of right. The interests which today are profiting so handsomely from radio and television may in the end find it in their own interest to treat their businesses primarily as a public trust.

Former President Hoover similarly thought that the Government should compel an applicant "to prove that there is something more than naked commercial selfishness in his purpose" (supra, p. 40). It is apparently only appellant who takes the strict position (Br. 26) that "if broadcasting tastes and standards are to be elevated, the reformation must be effected by the licensees and by the listening and viewing public, and not by the whip hand of government." The ACLU 47/ suggests no solution to the problem presented to the Commission by this case.

The ACLU's primary point, however, is that the Commission's standard -- "coarse, vulgar, suggestive and susceptible of indecent, double meaning" -- is unconstitutionally vague. 48/ It urges (Br. 14-18) that precision of standards is particularly important in the context of

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47/ The ACLU concedes that it is "obviously logical for the Commission to conclude that the whole licensing system could be subverted if a licensee found qualified by the Commission utilized the facilities entrusted to him for the purpose of completely delegating to a third person the function of programming the station for an inordinately large part of the broadcast day" (Br. 18); that it is "only logical for the Commission to insist that an applicant who desires a station in a particular community must make a showing as to how he is going to serve the needs of that community" (Br. 19); and that it is "perfectly logical for the Commission to conclude that the obligation of a station to serve the public carries with it the duty to make its facilities available for the electioneering process" and to "render a well-rounded program service" (Br. 19). But it goes no further.

48/ The ACLU, it may be noted, does not urge that the Commission has no proper concern with material which may not be reached by 18 U.S.C. 1464 (the obscenity statute), nor does it urge that the Commission could have no constitutionally valid basis for its decision. It merely objects to the statement of the decision as inadequate.

radio broadcasting because a licensee should not have to risk his license on a guess as to subjective standards; because a Commission pronouncement affects 5,000 broadcast stations which must periodically seek renewal of license, and which will avoid creative programming in the face of vague standards; and because effective judicial review cannot be had if the Commission's standards are unclear. The difficulty with this position is that while it is internally consistent and may be sound in other contexts, it misconceives the setting in two respects. First, since the Commission was deciding a particular case, its language must be read together with the material it describes. Secondly, since this was not rule making, there was no occasion for the sort of comprehensive definition the ACLU appears to demand.

In this case, the Commission was not announcing a general rule to be applied to conduct which had not yet occurred. Such a rule has only its own terms to give it substance, and is readily subject to misconstruction if not entirely clear. In this case the Commission was deciding whether the past operation of a station supported another license term. The Commission's language therefore takes concreteness from the material it describes. We do not believe there is room for reasonable doubt as to the Commission's meaning when it says (R. 1423-1424, 1583) that this is not a close case and that stories of the sort set out in paragraph 38 of the initial decision are smut and offensive under any standard. Perusal of the Charlie Walker material, together with the Commission's description of it as smut and susceptible of indecent meaning, amply demonstrates, we believe, that the Commission found the Charlie Walker material to be "dirt

for dirt's sake"[49] and not merely "impolite" or "graceless." (See ACLU Br. 11.) Whether or not obscene within the meaning of 18 U.S.C. 1464,[50] the Charlie Walker material was next door to it and patently vulgar in the worst sense of that term.

Furthermore, the ACLU's demand for precision is inappropriate to adjudication. As we have pointed out, the Commission was not purporting to lay down a guide for the future conduct of all licensees,[51] except to the extent that any decision on a particular set of facts has that effect. The question is not whether a standard has been enunciated which prescribes a sharp line that no licensee can misread. It is rather whether, after a fair hearing, a license renewal has been denied for understandable reasons. Colorado-Wyoming Gas Co. v. Federal Power Commission, 324 U.S. 626, 634; Berko v. Securities & Exchange Commission, 297 F.2d 116 (C. A. 2, 1961). It is decisive in this connection that appellant itself has made no claim that it did not understand the issue on which the case was heard, or that the Commission's decision is unclear to it. See e.g., Petition for Reconsideration (R. 1453-1477) and Reply To Opposition of Broadcast Bureau To WDKD Petition for Reconsideration (R. 1566-1575). This being so, the possibility that the decision does not prescribe a precise guide for the conduct of other licensees in respects other than the

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49/ See Kingsley Books, Inc. v. Brown, 354 U.S. 436, 439.

50/ That the broadcasts might also have violated the criminal statute of course would not immunize them to Commission scrutiny. National Broadcasting Co. v. United States, 319 U.S. 190.

51/ Even where obscenity statutes proscribe future conduct, no more is required than sufficiently definite warning when measured by common understanding. As the Supreme Court has stated, "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process." Roth v. United States, 354 U.S. 476, 491.

facts of this case, does not render the decision invalid.[52]

Nor is there substance in the suggestion of the ACLU that the Commission's decision may stifle creative broadcasting. The Commission was at pains to limit its holding to the facts of this case, pointing out (R. 1582) that the test it employed would not apply to other types of programming. No warrant exists in this decision for conjuring up demons of suppression of dramatic creativity. It is not reasonable, in our view, to urge as a ground for reversal that Commission action here puts a licensee in doubt as to whether he should broadcast a genuine work of literature containing offensive language (ACLU Br. 28). Appellant disavowed the Charlie Walker material and gave the Commission no occasion to consider a claim that it was part of a genuine work of literature or other artistic endeavor. While the decision understandably does not answer all of the ACLU's questions as to what a broadcaster may or may not do,[53] neither does it raise them or make them more difficult of resolution. It performs its function of deciding the case. No more was required.

52/ Surely, the ACLU does not intend to urge that the Commission could take no action on a license renewal based on the type of conduct involved here without first specifically proscribing the material through rule making. It may also be noted here that of the cases relied upon by the ACLU to show that clear standards may be written (Br. 18-19), National Broadcasting Co. v. United States, 319 U.S. 190, did involve rule making, and the other two (Simmons v. Federal Communications Commission, 83 U.S. App. D. C. 262, 169 F.2d 670, cert. den. 335 U.S. 846 and Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191, cert. den. 371 U.S. 821), quite clearly did no more than rule on particular facts.

53/ The Commission was careful to say (R. 1582):
"The Commission further stressed that in making its determination in this sensitive area, it would (i) resolve all close questions in favor of the licensee; if the matter were one basically of judgment, the judgment of the licensee should be respected; and (ii) give considerable weight to the views expressed by community (cont'd)

III. THE COMMISSION PROPERLY HELD THAT A DENIAL OF RENEWAL OF LICENSE WAS MADE COMPELLING BY THE LICENSEE'S FAILURE TO EXERCISE PROPER CONTROL OVER THE STATION'S PROGRAMMING AND BY THE EXCESSIVE COMMERCIALIZATION OF THE STATION

The Commission's determination that a denial of renewal of license was made compelling by the resolution of hearing Issues 2 and 4 adversely to appellant, is reasonable and proper.

The record amply supports the Commission's conclusion (R. 1420) on Issue 2 that Robinson did not exercise the appropriate degree of control and supervision over programming expected of a licensee and commensurate with his responsibility. For had he done so, Charlie Walker could not have continued to broadcast, undetected by Robinson, material which the licensee has disavowed and which he has not claimed served the needs of the service area. Even accepting, arguendo, Robinson's plea of ignorance (contrary to the Commission's finding, Point I supra), the Commission's conclusion that Robinson fell short of the responsibility properly required of a licensee, is clearly correct. Regents of New Mexico College v. Albuquerque Broadcasting Co., 158 F.2d 900, 906 (C. A. 10); Churchill Tabernacle v. Federal Communications Commission, 81 U.S. App. D.C. 411, 412-413, 160 F.2d 244, 246; National Broadcasting Co. v. United States, 319 U.S. 190, 205; Simmons v. Federal Communications Commission, 83 U.S. App. D. C. 262, 169 F.2d 670, cert. denied 335 U.S. 846. As the Commission stated (R. 1421), reiterating its statement in Mile High Stations, 28 F.C.C. 795, 797:

5/ (cont'd)
witnesses in their record testimony concerning programming. In this way, the matter would not be one of substitution of our taste for that of the licensee, but rather the proper discharge of our responsibility to insure that broadcast licensees do not contravene the public interest."

> Maintaining ultimate control over programming constitutes a most fundamental licensee obligation; and a licensee's unfamiliarity with its program content reflects an indifference tantamount in effect to abdication of control.

With respect to Issue 4, which was to "determine the manner in which the programming broadcast by the licensee, during the period of his most recent license renewal has met the needs of the areas and populations served by the station," the Commission concluded (R. 1426) that "Robinson tailored his operation more to the convenience of his advertisers than to the need of the public." As set forth in the Counterstatement, supra, pp. 14-15, the record furnishes abundant support for the Commission's finding that WDKD's programming was frequently saturated with commercial announcements, sometimes more than 440 a day (R. 1425-1426, 898; Tr. 255-256, 787).[54/] Moreover, Robinson himself admitted that, due to pressure from advertisers, the station sometimes presented as many as 10-14 spot announcements during a 14 1/2 minute time segment, and the record shows that the number was occasionally as high as 17 (R. 897-898; Tr. 177, 251-253, 533, 536, 780-782). Both the station's announcers and the advertisers themselves complained of the amount of commercial continuity (R. 897; Tr. 267, 642-644). And, when the station ran behind schedule, it was programming other than spot announcements which was omitted (R. 897; Tr. 258-259).

Neither the failure to maintain control over programming nor the excessive commercialization was compatible with Robinson's responsibility as a licensee. As the Commission stated in its Programming Policy

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54/ Appellant's attempt (Br. 30) to dismiss the excessive number of spot announcements as occasioned by the weekend and seasonal demands of merchants, fails to explain why the station broadcast 35 commercials in one 30 minute program of "Christmas Music" on Christmas Day 1959, and 17 commercials during another 15 minute time segment on that day (R. 898; Tr. 780-782).

Statement, 20 Pike & Fischer, Radio Regulation at 1912-1913:

> Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community. The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This, again is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others. [Emphasis supplied.]

The Commission properly determined that these deficiencies, though they might ordinarily result only in a short-term renewal, made a denial of renewal compelling when added to the licensee's misrepresentations and the Charlie Walker broadcasts. In further declining to exercise its discretion to grant appellant a short-term renewal, the Commission stated (R. 1584):[55/]

> On the question of exercising our discretion, there must similarly be considered the misrepresentation factor and, in

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55/ As noted in the Counterstatement, the Commission found (R. 1434-1435, 920) that Robinson had failed to establish that he made a conscientious, earnest effort to ascertain the broadcast needs of the community or to program in conformance with local needs. In the Commission's view (R. 1435, 920), the station had devoted inadequate time to agriculture, fell short of its responsibilities in the area of political broadcasts, presented "variable and skimpy" new programs, and provided virtually no opportunity for local self-expression or the development of local talent. The Commission also found (R. 1434-1435, 920, 902, fn. 19) that the station carried no educational programs, no public affairs programs, no editorial programs, no children's programs (except for recorded music directed at teen-age audiences), and no programs for minority groups (except for recorded music directed at Negro audiences).

addition, the station's overall programming record. As to the latter, we have taken into account the statements of the community witnesses relied upon by petitioner (and considered by us in pars. 50-67 of the Initial Decision). We have also, of course, considered the findings, set out in pars. 39-49, and par. 14, Concl. of the Initial Decision, as to the station's record in this respect (e.g., its serious over-commercialization practices). Clearly, a showing of the nature here involved falls far short of overcoming the adverse factors here found, even assuming, arguendo, it to be relevant (but see pars. 11, 13; FCC v. WOKO, 329 U.S. 223).

Appellant has not shown these determinations to be improper or an abuse of the Commission's discretion. 56/

CONCLUSION

For the foregoing reasons, the Commission's order should be affirmed.

Respectfully submitted,

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

September 4, 1963

56/ Appellant does not challenge (Br. 30, 32-34) the evidentiary basis for the Commission's findings that it failed to maintain proper control over programming and that it carried the number of commercials which the Commission determined to be excessive. To the extent that appellant claims that consideration of these matters (as well as the Charlie Walker material) exceeded the Commission's authority, we have answered its contention in Point II, supra. The ACLU takes no position on these issues (ACLU, Br. 12).

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,587

E. G. ROBINSON, JR., tr/as
PALMETTO BROADCASTING COMPANY (WDKD),

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL FROM A DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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QUESTIONS PRESENTED

The Appellant and Appellee have agreed that the following question is presented:

> "Whether the Commission's action in the circumstances of this case in refusing to renew the license of Station WDKD because of broadcasts by a disc jockey, which broadcasts the Commission found in an administrative proceeding on WDKD's renewal to be "coarse, vulgar, suggestive, and susceptible of indecent, double meaning," was violative of the First Amendment and of 47 U.S.C. Sec. 326, and in other respects arbitrary, illegal, and contrary to the public interest."

In addition, Appellee has urged that the following separately stated issues are also presented.

> "1. Whether the Commission correctly held that misrepresentations by the licensee independently warranted denial of renewal.
>
> "2. Whether the Commission correctly held that the resolution of two additional issues adversely to the licensee made the case for denial of renewal compelling."

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STATUTES

MISCELLANEOUS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,587

E. G. ROBINSON, JR., tr/as
PALMETTO BROADCASTING COMPANY (WDKD),
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM A DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

STATEMENT OF THE CASE

This case has its genesis in a letter from the Federal Communications Commission to WDKD dated May 11, 1960. This letter reads as follows (WDKD, Exhibit 3, R. 211):

> "This is with reference to certain complaints received by the Commission concerning certain program material broadcast by your station, with particular reference to the Charlie Walker programs.

> "It is alleged in substance that said programs are vulgar and suggestive, and are susceptible of double meanings with indecent connotations. The tape recordings of some of your programs are in the possession of the Commission.
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> "It is the practice of the Commission to associate complaints with the files of the stations involved and afford the licensees an opportunity to submit a statement with respect thereto. Accordingly, this matter is being brought to your attention.
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> "In light of the foregoing, it is requested that a statement be submitted by you with respect to this matter within 15 days from the date of this letter."

Counsel for the station made informal requests to the Commission's staff for permission to listen to the tape before answering the letter. This permission was refused. Accordingly, on May 20, 1960 counsel for the station wrote to the Commission stating in part as follows (WDKD, Exhibit 4, R. 212):

> "Station WDKD has no knowledge of having broadcast any 'vulgar or suggestive' programs.
>
> * * * * *
>
> "The undersigned has been supplied with and listened to a tape of a typical Charlie Walker program. No instances of vulgarity or suggestiveness were noted.
>
> * * * * *
>
> "In the meantime, in an effort to exercise the utmost caution, the licensee has conferred with Mr. Walker who has denied knowledge of broadcasting anything which might fall in the category of vulgarity or suggestiveness. Mr. Walker has nonetheless been requested to be extremely circumspect in his broadcasts."

The letter included a formal request for the right to hear the tapes. Apparently, the request was granted in part (See WDKD, Exhibit 5, R. 213-214), for on June 8, counsel was permitted to audition some but not all the tapes. Counsel wrote to the licensee giving some excerpts from the tapes and concluded that they were "indeed suggestive

and in some respects, vulgar" (WDKD, Exhibit 5, R. 214).

The licensee thereafter wrote the Commission on June 10, 1960 stating that he had reviewed excerpts of the Charlie Walker broadcasts and continuing (WDKD, Exhibit 6, R. 215):

> "These statements made by my employee, Charlie Walker, were not known to me, and I cannot help but agree that they are suggestive and, in some cases, of a vulgar nature. As a result of this information and in line with my avowed policy of maintaining a clean and decent Radio Station, I have unconditionally released Charlie Walker from my employ as of the date of this letter.
>
> "I want to stress to you the fact that I was not acquainted with the nature of the statements made by Charlie Walker and the show on the air at my Radio Station. . ."

On March 21, 1961 the WDKD renewal application was designated for hearing on four separate issues as follows:

1. Whether the licensee misrepresented facts to the Commission and/or was lacking in candor.

2. Whether the licensee maintained adequate control or supervision of programming material broadcast over his station.

3. Whether the licensee permitted program material to be broadcast over Station WDKD on the Charlie Walker show, "which program material was coarse, vulgar, suggestive and susceptible of indecent, double meaning."

4. To determine the manner in which the programming of the station has met the needs of the areas and populations served by the station.

A hearing was held in Kingstree, South Carolina before a Hearing Examiner. The Examiner had great difficulty in arriving at a decision (see ¶25 of Conclusions, Initial Decision, R. 925). To him the "pivotal issue in this case is issue three--did Robinson permit Walker to broadcast over his station material that was coarse, vulgar, suggestive, and

susceptible of indecent, double meaning?" (¶1 of Conclusions, Initial Decision, R. 911). The Examiner pointed out that while Issue 3 was not phrased in the terms of "obscenity" as set forth in 18 U. S. C. § 1464, he found it "unnecessary to draw hairline distinctions between the meaning of 'coarse, vulgar, suggestive, and susceptible of indecent, double meaning' as used in this issue and 'obscene and indecent' as used in the statute." (¶3 of Conclusions, Initial Decision, R. 912). He concluded that both were the same and pointed out that Congress had specifically conferred authority on the Commission to act on matters constituting violation of 18 U. S. C. § 1464.

After a lengthy discussion of the decision of the Supreme Court in the Roth[1] case concerning obscenity, the Examiner concluded that the test laid down by the Supreme Court in Roth for judging obscenity was not a general standard for use in the case of all federal obscenity statutes but was limited to the obscenity statute governing the use of the mails. In the Examiner's view material that would pass muster under the postal statutes might not be acceptable for broadcasting under radio's obscenity statute since (¶ 7 of Conclusions, Initial Decision, R. 915-916),

> "unlike the acquisition of books and pictures, broadcast material is available at the flick of a switch to young and old alike, to the sensitive and the indifferent, to the sophisticated and the credulous. Further, broadcast material is delivered on a route commonly owned by the public on a vehicle especially licensed to serve them and is received on property owned by the consignee. In short, there is a universality of utility and a public stake present in broadcasting wholly lacking in the kind of thing that was involved in Roth. . . .All hands would agree, it is supposed, that the Postmaster General would be hard put to ban the Bible from the mails. Would they not also agree that the Commission might be justified in holding that a licensee who telecast a documentary, live, in depth, of the Song of Solomon had not met the public-interest standard? . . . In determining obscenity in broadcasting, questionable

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[1] Roth v. United States, 354 U. S. 476 (1957).

material should not always have to be weighed within the context of everything else that is presented with it. Brief injections of erotica, pornography or smut are enough to seriously prejudice, if not destroy, the general utility of radio and television. 'The effect on the average man of normal sensual impulses' test hardly serves to protect tots from getting an eye or earful of smut which their parents, quite legitimately, may desire they be shielded from, nor does it protect the adult of tender sensibilities from being exposed to that which to him or her is truly revolting. Both types of listeners and viewers have a considerable stake in broadcasting. Considering the 'universality of utility' aspect of broadcasting, it would seem that whether broadcast material is in bad taste and shocks and offends substantial segments of a community might well be a perfectly proper consideration for determining whether such material is obscene. The 'shameful and morbid interest in sex so pervasive as to submerge any ideas of redeeming social importance' test and the requirement that the material in question to be obscene must exceed limits of tolerance imposed by current standards of a community certainly would appear to permit a lot of broadcast material to find First Amendment protection that nevertheless would be highly offensive to large segments of a listening or viewing audience. The reaction of even minority blocs of the public are entitled to consideration when public interest judgment is made. A high degree of acceptability among literary cognoscenti as a test for obscenity seems woefully inadequate when used in connection with a medium the very nature of which is general public acceptability. Although the converse of all the foregoing propositions was found by the Court to be appropriate for application under the facts present in Grove Press, it appears manifest that such application in broadcast cases would be unduly restrictive to regulation in the public interest. All hands would agree, it is supposed, that the radio or television set should never require that sequestered treatment accorded the family revolver, the rat poison, or the book on love and marriage. Similar agreement may be assumed for the proposition that the dials of those sets should not have to be approached timidly and in fear of receiving offense by those of highly developed sensibilities."

Upon the basis of the foregoing discussion, the Examiner concluded that either under the Roth test or under the standard expounded by him the Walker broadcasts were obscene and indecent and a fortiori coarse, vulgar, suggestive and suceptible of indecent double meaning. After

considering the other issues and weighing the possibility of imposing a sanction less than denial of license, he concluded that he had available to him only the alternatives of a grant or denial of the license–nothing in between. He concluded that a denial of license was necessary, saying (¶ 27 of Conclusions, Initial Decision, R. 927):

> ". . . it would be unconscionable to permit Robinson to come off here with only token punishment for the grievous deviation he has permitted his station to make from the public interest norm. It is also important that disposition here should stand as a warning to others that such licensee misconduct is not to be condoned. In the end, to the examiner, these considerations override those running in favor of granting the applications."

Exceptions were filed to the Initial Decision, and oral argument was thereupon held before the Commission en banc. The Commission affirmed the Initial Decision but altered some of the Findings and Conclusions. In particular, the Commission disagreed with the Examiner's statement that the issues presented a close case and that Issue 3 was the pivotal issue in the case. The Commission was of the opinion that Issue 1—misrepresentation and/or lack of candor–was as important as Issue 3 and that a denial of license was warranted under each of Issue 1 and 3 standing alone. It also found against the station on Issues 2 and 4 but indicated that so far as these issues were concerned, it would be inclined to grant a short term renewal if Issues 1 and 3 were not involved.

So far as Issue 3 is concerned, the Commission did not adopt the Examiner's position that the Charlie Walker programs were obscene and indecent within the meaning of 18 U.S.C. § 1464. It felt that Issue 3 as drawn did not encompass within its terms possible violation of that statute. But the Commission went on to say that its authority in the field is not limited to 18 U.S.C. § 1464, as WDKD had apparently argued. The Commission rejected the argument, saying, (¶ 21, R. 1423):

> ". . .we consider WDKD's argument that at the time of renewal, the Commission may not constitutionally consider

> whether the station has carried extensive amounts of coarse, vulgar, suggestive, double-meaning programming. If this argument is correct, a station could present, for 75% or 80% of its broadcast day, entertainment which consisted of records interspersed with the type of smut set out in the Examiner's Initial Decision . . .; and it would nevertheless be no concern of the Commission at the time of renewal. Inasmuch as record-disc jockey type of entertainment is so popular and widespread on radio, the argument comes down to this: Radio could become predominantly a purveyor of smut and patent vulgarity–yet unless the matter broadcast reached the level of obscenity under 18 U.S.C. 1464, the Commission even though charged to issue licenses only when it is in the public interest, would be powerless to prevent this perversion or misuse of a valuable national resource. The housewife, the teenager, the young child–all–would simply be subjected to the great possibility of hearing such patently offensive programming whenever they turn the dial."

The Commission recognized that the above standard could pose constitutional questions under the First Amendment. It concluded, however, that it could act under its public interest standard if it observed certain safeguards, saying, (¶ 22, R. 1424):

> "But this does not mean that the Commission has no authority to act under the public interest standard. Rather, it means that the Commission cannot substitute its taste for that of the broadcaster or his public–that it cannot set itself up as a national arbiter of taste. Such wholly improper action by the Commission would be disastrous to our system of broadcasting and would not be tolerated by the courts or by the Congress. Turning to the specific issue before us, this means that we cannot decide that some pattern of broadcasts is 'vulgar,' 'suggestive,' 'coarse,' and 'susceptible of indecent, double meaning' on the basis of our own taste or preference for what we believe should be broadcast. What we must find is that the broadcasts in question are flagrantly offensive–that by any standard, however reasonably weighted for the licensee, taking into account the record evidence, the broadcasts are obviously offensive or patently vulgar. In short, the licensee necessarily and properly has wide discretion in choosing <u>every</u> type of programming to be broadcast to meet the needs and interests of the public in his area. <u>Programming Statement</u> of July 29, 1960. It follows that in dealing with

> the issue before us, we cannot act to deny renewal where the matter is a close one, susceptible to reasonable interpretation either way. We can only act where the record evidence establishes a patently offensive course of broadcasts."

Following the release of the Final Decision denying the renewal application, WDKD filed a Petition for Rehearing. With respect to Issue 3 the Commission attempted to restate the standard followed by it, saying (¶ 9, R. 1582-1583):

> "We made clear that in determining whether the programming in question was coarse, vulgar, suggestive or susceptible of indecent double meaning, the Commission must look to whether it was patently offensive;[2] that the presentation over stations of coarse, vulgar programming which is patently offensive, is inconsistent with the public interest because of the special nature of the broadcast medium, where the listeners in the home or car (including children) might be subjected to such material simply by having left the set tuned to a particular frequency or station (e.g., WDKD, the only local station in Kingstree) or in turning the dial. The Commission further stressed that in making its determination in this sensitive area, it would (i) resolve all close questions in favor of the licensee; if the matter were one basically of judgment, the judgment of the licensee should be respected; and (ii) give considerable weight to the views expressed by community witnesses in their record testimony concerning programming. In this way, the matter would not be one of substitution of our taste for that of the licensee, but rather the proper discharge of our responsibility to insure that broadcast licensees do not contravene the public interest.
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> "We further held that by <u>any</u> standard, however reasonably weighted in the licensee's favor, the programming in question was coarse, vulgar, etc., within issue 3. We adhere to

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[2] It is significant that the Commission felt the need of adding a footnote attempting to limit the scope of "patently offensive." The footnote reads as follows:

> "We stress that our concern is limited to matter that is 'coarse, vulgar, suggestive or susceptible of indecent double meaning.' The 'patently offensive' standard has, of course, <u>no</u> applicability to other types of programming–e.g., religious or controversial issue broadcasts–that may happen to offend some segment of the public."

> that holding. Taking into account the nature of the aural broadcast medium, this is not a close case: It is, we think, one of flagrant abuse of the only operating facilities in the community."

The Commission on January 7, 1963 denied the Petition for Rehearing and finalized its action refusing to renew the WDKD license.

SUMMARY OF ARGUMENT

I.

In the case of radio broadcasting–unlike other media of expression –ACLU supports the constitutionality of licensing because the medium cannot exist without licensing. Where the existence or creation of a medium of expression depends upon a licensing system, the Constitution permits licensing and a showing that operation under the license will serve the public interest.

The fact that the Commission can constitutionally license broadcast stations does not excuse it from meeting other tests prescribed by the First Amendment. Kingsley Books v. Brown, 354 U. S. 436 (1957); Times Film Corporation v. Chicago, 365 U. S. 43 (1961). ACLU urges that as a minimum matter speech or expression in broadcasting may not be constitutionally restrained or punished unless the government agency involved establishes standards which meet two tests. First they must be clear and unambiguous to the persons who must comply with them; secondly they must be directed at or related to conduct as to which the government agency has a statutory and Constitutional right to be concerned.

There are three reasons in constitutional policy for requiring adequate standards. In the first place, vague standards are not fair to the licensee who must conform his conduct to government directives. If the standards are vague, he must guess as to what this Commission or some future Commission may decide the vague words mean.

In the second place, vague standards have a stultifying effect that goes beyond the individual licensee. There are more than 5,000 broadcast stations–AM, FM and TV–in operation. Each one depends for its survival upon a renewal of license every three years. The stations, therefore, do their best to anticipate what the Commission's desires will be and to comply therewith. Otherwise they may lose their licenses. When standards are adequately defined, licensees know with reasonable certainty what type of programs are permitted and those which are prohibited. However, when the standard is vague, where ambiguities abound, where there is too much breadth, a cumulatively stifling effect on creativity is generated. Not only are licensees deterred from carrying programs specifically mentioned by the Commission, but in addition they must out of sheer self-protection exercise the greatest caution. They avoid programs which might ultimately pass muster with the Commission because they cannot afford to run the risk of guessing wrong. Vague standards, therefore, inevitably force triviality and "safe" programming.

In the third place, adequately stated standards are necessary if effective judicial review is to be maintained. Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952). With vague standards "the administrative first step becomes the last step." (343 U. S. at 532).

The Commission has failed to set forth adequate standards in this case. The standard of "vulgar, suggestive, coarse and susceptible of indecent double meaning" is fatally vague, ambiguous and too all-encompassing. The statute authorizes the Commission to proceed with respect to "obscene" programs, but the Commission has chosen not to do so. While ACLU recognizes that the test of obscenity is itself most difficult of application, nevertheless the fact remains that there have been several hundred years of judicial history interpreting the word and many learned articles have been written on the subject. With respect to the standard utilized by the Commission there is no judicial history to aid us. Nor does the Commission in its opinion furnish any narrowing or limiting scope. The dictionary definitions indicate that the words cover

an extremely broad spectrum of what might be classified as undesirable conduct. Comprehended within the definition might be conduct which is merely impolite, graceless, clumsy, boorish, common, unrefined as well as indecent or obscene. An examination of the evidence upon which the Commission relied in this case shows that all of these degrees of conduct were involved in the case, and the Commission nowhere in its opinion particularizes what specific grade of "misconduct" it found objectionable.

The Commission's standard is further invalid because in its opinion it has indicated that the "offensiveness" of the material is to be judged upon the basis of its effect on the housewife, the teenager, the young child. The Commission has frequently criticized broadcasting as a "vast wasteland." This criticism is not predicated upon any daring excursion by licensees into new fields. On the contrary the criticism has been of sameness, safe programs, timidity of approach. Yet the same agency that criticizes broadcasting on this score is one that in the next breath cautions licensees that they must not put on any programs that are judged patently offensive by the standard of acceptability to the housewife, the teen-agers, the young child. The Supreme Court in Butler v. Michigan, 352 U. S. 380 (1957) struck down a Michigan statute which prevented adults from obtaining books which could have a potentially deleterious effect on youth. The Commission in effect is doing the same thing in this case.

II.

The Commission's second ground for denying the license was certain misrepresentations by the licensee. ACLU urges the Commission to remand this issue to the Commission for further consideration. It does so for two reasons. In the first place, the misrepresentation issue is inextricably tied up with the programming issue. Even though the Commission has indicated that it would have denied a renewal on misrepresentation alone had not the vulgarity issue been present, the

intensity of its views on vulgarity is so strong that ACLU believes that some Commissioners might have voted a different way if they knew they could not have relied on the vulgarity issue for denial of license.

Secondly, the Commission procedure with respect to the misrepresentation issue leaves much to be desired. The whole matter of misrepresentation arose in the first instance because the Commission sent a letter to the licensee asking him for his comments as to whether there had ever been any obscenity on the Charlie Walker broadcast. The Commission at that time already had tapes of the Charlie Walker broadcast but refused to make them available to the licensee. When it is remembered that the Charlie Walker program had been broadcast for almost nine years and consumed approximately four hours a day, this was an unreasonable procedure. The Commission should have called the broadcast to the attention of the licensee and asked him to comment thereupon. Instead, it chose to follow a procedure which almost smacks of entrapment. Such faulty procedure, particularly where a free speech issue is involved, should not be condoned.

ARGUMENT

The Commission has concluded that public interest, convenience and necessity would not be served by a renewal of the WDKD license. Its decision is based upon four different grounds. Two of these grounds–supervision of the station and overall program composition–the Commission indicated would by themselves not support deletion of the station but instead would warrant a short term renewal. ACLU takes no position with respect to these two issues.

As to the other two issues the Commission indicated that either one by itself would warrant deletion of the station. ACLU is primarily interested in one of these issues–Issue 3 the so-called vulgarity issue. The bulk of the brief will be devoted to it. We shall comment but briefly on the other issue, misrepresentation and lack of candor. Normally,

issues of misrepresentation and candor do not involve questions of free speech. A brief discussion of the issue is warranted in this case because the misrepresentation and lack of candor are intertwined with the free speech issue.

I. The Denial Of A License On The Ground That Certain Program Material Was "Coarse, Vulgar, Suggestive, And Susceptible Of Indecent, Double Meaning" Was Improper Since The Standard Thus Established Is Too Vague And Imprecise To Satisfy The Constitutional Requirements Of The First Amendment.

Congress in Section 326 of the Communications Act and the Supreme Court in a series of pronouncements[3] have declared that the protection of the First Amendment is applicable to radio broadcasting. The Commission does not dispute "the great importance of the First Amendment and censorship (Section 326) considerations" (¶ 22, Final Decision, R. 1424).

ACLU submits that the First Amendment issue in broadcasting is unique; it is entirely different from that applicable to other media of expression. This is so because in broadcasting no person is permitted to exercise any rights of expression unless he first obtains a license for that purpose from the government. With the exception of broadcasting, ACLU has consistently opposed any licensing system for a free-speech medium on the ground that the very necessity of obtaining a license is inconsistent with free speech. If a person must obtain permission from the government before speaking in situations where the granting of its permission is not automatic, unconstitutional restrictions on free speech are inherently present.

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[3] National Broadcasting Co. v. United States, 319 U. S. 190, 226-227 (1943); United States v. Paramount Pictures, 334 U. S. 131, 166 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 502 (1952); Superior Films, Inc. v. Dept. of Education, 346 U. S. 587 (1953).

In broadcasting, however, a different situation obtains. For without a system of licensing there would be chaos and hence no medium. Where the very existence or creation of a medium of communication depends upon a licensing system, ACLU agrees that such a licensing system can be squared with the constitutional requirements of free speech. National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). ACLU further agrees that when the medium by its very nature cannot be open to all, the government can condition a license upon the station operator rendering a service which furthers the public interest.

It must be emphasized, however, that merely because the Commission can constitutionally require a license as a prerequisite to broadcasting and can require a showing as to how the licensee has served or will serve the public interest, it does not mean that the licensee has no First-Amendment rights left. On the contrary, the Supreme Court has explicitly ruled that even where a system of licensing or prior restraint is valid, the standards for grant or denial of license or for injunctive restraint must meet constitutional tests prescribed by the First Amendment. Kingsley Books v. Brown, 354 U.S. 436 (1957); Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

ACLU submits that as a minimum matter speech or expression in broadcasting may not constitutionally be restrained or punished unless the government agency involved establishes standards which meet two tests. First, they must be clear and unambiguous to the persons who must comply with them and secondly, they must be directed at or related to conduct as to which the government agency has a statutory and constitutional right to be concerned. In the context of radio broadcasting, there are three principal reasons for such a policy. In the first place, fairness to the licensee demands that he should be able to ascertain by the exercise of reasonable intelligence whether particular conduct meets the standard or not. A broadcasting license is a valuable privilege. Its retention or loss should not turn upon the basis of a licensee having to guess what subjective standard the licensing agency

is going to apply. The members of the FCC are appointed for a seven year term and many serve less than their seven years. There is a constant change of personnel.[4] Individual viewpoints and philosophy change. If any vagueness or ambiguity is permitted to creep into the standard, the licensee is faced with the continuing risk not only of ascertaining the views of the members of the Commission who are incumbents at the time of the broadcast but also guessing who the new members might be when his application for renewal is filed and if designated for hearing who the members might be at that time of decision. ACLU recognizes that it is not humanly possible to write completely objective standards–that subjectivity is an inevitable element in all decision making. But in view of the importance of minimizing the restrictive effects of licensing upon free expression, the Commission must be held to a most strict test. It must make a supreme effort to write its standards as clearly, crisply and unambiguously as possible. All possible vagueness must be eliminated.

In the second place, the action or pronouncement of the Commission has effects and reverberations extending far beyond the results of an individual case. There are more than 5,000 broadcast stations–AM, FM and TV–in operation. Each one depends for its survival upon a renewal of license every three years. Since extensive investments are involved in all situations and since large profits are realized from operations in many instances, it is only natural for broadcast station operators to avoid any kind of conduct that could jeopardize the license. This is not a theoretical fear. It exists not only because business men are sensitive to government conduct that may affect their investment, but also because in this very case the Commission made it all-too pointedly clear that the license of WDKD was being deleted because "it is. . .important that disposition here should stand as a warning to others

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[4] Indeed in the relatively short period since the final decision of the Commission was rendered on July 26, 1962, there has been a change in three out of seven members of the Commission; Commissioners Henry, Cox and Loevinger now serving in the place of Commissioners Cross, Craven and Minow.

that such licensee misconduct is not to be condoned."[5]

In the context of such a situation, adequately-defined standards are a must. When the standards are adequately defined, licensees know with reasonable certainty what type of programs are permitted and those which are prohibited. The Commission may be wrong in choosing a particular standard but when the standard is adequately defined, the effect of its action is limited. However, when the standard is vague, where ambiguities abound, where there is too much breadth, a cumulatively stifling effect on creativity is generated. The effect of a vague standard can be likened to a big stone thrown into a placid pool. Not only does it create a big splash, but it generates a series of waves and ripples that disturb the calm surface of the pond to its very shores.

With a vague standard in existence, not only are licensees deterred from carrying programs specifically mentioned by the Commission, but, in addition, they must, out of sheer self-protection, exercise the greatest caution. They avoid programs which might ultimately pass muster with the Commission because they cannot afford to run the risk of guessing wrong. For if they guess wrong as to how this Commission or a future Commission will apply the faulty standard, they will as a minimum matter have to go through an expensive renewal proceeding[6] and may in

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[5] The language quoted is from ¶ 27 of the Conclusions of the Examiner's Initial Decision, (R. 927). However, it is significant that while the Broadcast Bureau took numerous exceptions to the Hearing Examiner's conclusions, it did not except to the above language. It excepted to the sentence immediately following this language, namely, "In the end, to the examiner, these considerations override those running in favor of granting the application." The Commission agreed with the Broadcast Bureau and deleted the objected-to sentence. However, it permitted the balance of the paragraph to remain. (Appendix to Final Decision, Ruling on Exception 55, (R. 1435)).

[6] Deviation from Commission standards entails a risk for the licensee whether or not a determination is made by the Commission to institute a renewal proceeding. Once a determination is made that a substantial question exists concerning deviation from standards, the particular licensee is placed in a state of limbo. Not only is his renewal held up, but any application he may have for that or any other station is placed in a "freeze" condition. If he desires to improve his technical facilities; if he wants to apply for a new station; if he desires to sell a station—all applications seeking such action are held pending resolution of the substantive question. This is a well-known risk that every licensee knows from experience he faces if he deviates from established norms. ACLU does not believe

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addition suffer the severe penalty of losing their license entirely. It is too much to expect businessmen to run this risk. Faced with such alternatives, licensees cannot be expected fearlessly to program their stations, to experiment with the novel, to try the unusual. Instead, a vague standard inevitably forces triviality and "safe" programming.

In the third place, adequately stated standards are necessary if effective judicial review is to be maintained. Mr. Justice Frankfurter in his concurring opinion in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 532 (1952) has set forth the reason therefor clearly and concisely:

> "Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently appraise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. On the basis of such a portmanteau word as 'sacrilegious', the judiciary has no standard with which to judge the validity of administrative action which necessarily involves, at least in large measure, subjective determinations. Thus the administrative first step becomes the last step."

The Commission is required to issue a license or renewal thereof if public interest, convenience or necessity will be served thereby. While the courts are required to show deference to the findings and rulings of the Commission in the area of its expertise, ACLU submits that in the area of free speech the Commission has no specialized expertise. Action of the Commission which has an impact on expression must be shown by clear and convincing proof that it complies with the First Amendment. The courts cannot properly discharge their function

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that this is the occasion for passing upon the propriety or impropriety of such Commission procedure. It calls attention to the practice to illustrate the tremendous pressures that exist to force licensees to learn what established standards there are and to adhere to them. The more broadly drawn the standard, the greater the caution and timidity which are forced upon licensees.

of review if the standards of the Commission are unclear in any way.

ACLU recognizes that the writing of unambiguous standards may be an exacting and difficult assignment. But it is possible; the Commission has done so in a number of situations. Thus in Simmons v. FCC, 83 App. D. C. 262, 169 F. 2d 670, (1948), cert. den. 335 U. S. 846 the Commission denied an application because the station owner proposed to abrogate his responsibility as a licensee by turning over to a network the full programming of his station for large segments of the day. This determination is understandable in light of the statutory mandate that the Commission should grant licenses only to those persons who are qualified and who will serve the public interest. It is obviously logical for the Commission to conclude that the whole licensing system could be subverted if a licensee found qualified by the Commission utilized the facilities entrusted to him for the purpose of completely delegating to a third person the function of programming the station for an inordinately large part of the broadcast day. The standard is clear, and its relationship to the statutory objective is logical.

Another illustration is the Commission's Chain Broadcasting Regulations–National Broadcasting Company v. United States, supra. Here also the Commission spelled out in clear terms specific types of conduct which were forbidden. The definitions of proscribed conduct were sufficiently precise that licensees could have no reasonable difficulty in understanding what was permitted and what was forbidden. Moreover, the practices forbidden had a demonstrated nexus to statute-granted power in that the forbidden practices were inconsistent with licensee responsibility, they were restrictive and anti-competitive in operation, and they were detrimental to the maximum utilization of radio in the public interest.

A similar rationale prevailed in Henry v. FCC, 112 App. D. C. 247, 302 F. 2d 191, (1962), cert. den. 371 U. S. 821. In that case the Commission denied an application for initial license because the applicant failed to make a showing that it had attempted to ascertain the needs of the

community for which it was seeking a license. Since the Communications Act requires the Commission to make a fair and efficient distribution of stations to the various communities throughout the United States, it is only logical for the Commission to insist that an applicant who desires a station in a particular community must make a showing as to how he is going to serve the needs of that community. After all Congress ordered an equitable distribution of assignments to communities not for prestige purposes of having a station identified merely by name with such communities but for the meaningful purpose of having the needs of the community served by the station. It is logical for the Commission to conclude that it could not rely upon an applicant being able to serve those needs when he made no efforts to ascertain those needs.

The previous illustrations have dealt with the question as to how a licensee equips himself to handle programs and not to programs as such. A more delicate problem of free speech arises when programs are directly involved. But even here Commission action is permissible. One such instance is the matter of political broadcasting. The Commission has ruled that the carrying of political broadcasts is part of the public-service obligation of a station. Its standard is clear and unambiguous and is reasonably related to the obligation of a station to serve its community. An informed electorate is an indispensable part of the democratic process upon which our form of government depends. Broadcasting is an increasingly important medium for reaching vast segments of the public. It is perfectly logical for the Commission to conclude that the obligation of a station to serve the public carries with it the duty to make its facilities available for the electioneering process– Farmers Union v. WDAY, Inc., 360 U. S. 525, 534-535 (1959).

Another such instance is the requirement of the Commission that stations must render a well-rounded program service. This is consistent with the pluralistic concept of community life. A community is not a monolithic institution with a single interest. It is composed of many diverse groups with a variety of interests. The licensee is

franchised to serve the entire community and not a portion thereof. The Commission is, therefore, justified in deciding that a licensee must undertake to serve the needs of the entire community and not merely a portion thereof. A judgment by the Commission that this duty entails the carrying of some religious, agricultural, educational, discussion and news programs in addition to entertainment programs is a standard that licensees can reasonably be expected to understand and is reasonably related to the duty of licensees to serve the public interest of the community for which they are licensed.

A problem of a different dimension is presented when Commission action of a negative aspect is involved–thou shalt not. Here policy considerations of a different nature come into play. When the Commission holds that a licensee in order to serve the public interest must carry a certain category of programs, it is true that the Commission is thus impelling conduct that the licensee of his own volition might not adopt. Nevertheless, the directive still permits him to utilize the full scope of his imagination and creativity in producing the kind of programs that comply with the ruling. However, when a negative direction is given, creativity in that direction is shut off. A compelling case must be made before such directives are sanctioned.

ACLU is not suggesting that there is a talismanic test of propriety based upon whether the government direction is affirmative or negative in form. The history of legal concepts show that the difference between affirmative and negative is often a matter of form only and not substance. Nor does ACLU urge that the Commission can never pursue the negative route. It recognizes that the statute negatives broadcasts of lotteries, (18 U.S.C. § 1304) obscene material (18 U.S.C. § 1464) and fraudulent schemes (18 U.S.C. § 1343). ACLU has no doubt that under present Supreme Court decisions such prohibitions are constitutional. Nor does ACLU suggest that the Commission cannot under any circumstances devise additional prohibitions which will satisfy the constitutional requirements of free speech. It does urge, however, that before the

Commission is permitted to enter the field of prohibiting expression, of ruling against the carrying of programs, it must make a most convincing showing that the standard it has prescribed is clear and unambiguous and that the prohibition of the program involved is reasonably related to a statutory objective which the Commission is authorized to implement.

The standard in this case fails to meet such objectives. It is fatally vague, ambiguous and too all-encompassing. It is difficult to understand why the Commission felt constrained to use a standard of "vulgar, suggestive, coarse and susceptible of indecent, double meaning." The statute has authorized the Commission to proceed with respect to programs that are "obscene".[7] The Commission apparently felt that the "seas" of obscenity were uncharted by the courts since "the legal considerations applicable to 18 U.S.C. 1464 are not clear because of the dearth of court decisions dealing with this section" (Footnote 7, Final Decision, R. 1424). ACLU recognizes that the pronouncements of courts in the obscenity field are not too easy to rationalize. However, the fact remains that "obscenity" has been the subject of judicial interpretation for several hundred years and scores of learned articles have been written on the subject. If the Commission felt unequipped to cope with "obscenity" with this history, it is difficult to perceive how it felt equipped to apply a brand new standard broader and vaguer than "obscene" and with no judicial history at all interpreting the words.

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[7] The Examiner faced up to the problem and ruled that the broadcasts were obscene within the meaning of the statute. The Commission itself felt that it could not properly pass upon this question since the matter of violation of the statute was not a specific issue in the hearing (¶ 19 of Decision, R. 1422). Feeling this way, it is surprising that the Commission did not remand the matter for further consideration under appropriate issues. Why was it in such a hurry to resolve the matter on the basis of its own poorly drawn issues? No present public harm could be entailed by ordering further proceedings even under the Commission's view of the matter. The Charlie Walker broadcasts had been discontinued, and there is no indication that any programs of a similar nature were being broadcast at that time.

Despite a lack of judicial history giving scope and meaning to the words, the Commission itself makes no effort to set specific boundaries to the words utilized in the standard. It apparently assumes that the words have such an accepted and unmistakable meaning that their mere recitation adequately conveys their scope. This is just not so. Recourse to the dictionaries shows that the words are unusually broad and far-reaching in their application. For example, Webster's Collegiate Dictionary supplies the following definitions:

> "Vulgar" is defined as "1. Of or pertaining to the common people, or general public; general; public; popular; as a vulgar superstition. 2. Vernacular; also, written in or translated into the vernacular; as, poems in the vulgar tongue. 3. Belonging or relating to the common people as distinguished from the cultivated or educated; plebeian; boorish; also, offensive to good taste or refined feelings; low; coarse; as, vulgar ostentation; vulgar manners. 4. Obscene; profane; low; as, a vulgar joke."
>
> "Suggestive" is defined as "1. Tending to suggest; full of suggestions; stimulative of thought. 2. Tending to suggest what is improper, indecent, or the like."
>
> "Coarse" is defined as "1. Common; of inferior quality or appearance; mean; hence, as applied to metals, unrefined. 2.a. Composed of large parts or particles;–opposed to fine. b. Harsh, rough, or rude, as opposed to delicate or dainty. 3. Unrefined; vulgar; gross."

Bergen and Cornelia Evans in their Dictionary of Contemporary American Usage compare "vulgar" with "common" and "ordinary" as follows:

> "Common means possessed or shared by all alike (Venus, says Robert Burton, was as common as a barber's chair). When applied to persons it usually has a derogatory connotation of cheapness or inferiority. Vulgar means belonging to the people and the meaning attached to it depends on how you view belonging to the common people. The common people themselves (though they probably do not view themselves as such) obviously don't think much of it, since to them vulgar means coarse, indecent (His talk was just vulgar. I was ashamed to be with him). To a few uncommon intellectuals (who are, no doubt, tired of intellectuals) vulgar often means strong in a coarse way (He had a vulgar virility that

> offset his coarse greed). Ordinary means what is to be expected in the usual order of things. It is slightly derogatory, but not much; just a tired admission from the sad wisdom of experience that the usual order of things, so far as human beings go, isn't much."

The dictionary definitions represent an extremely broad spectrum of what might be classified as undesirable conduct. Comprehended within the definitions might be conduct which is merely impolite, graceless, clumsy, boorish, common, unrefined, as well as indecent or obscene. As a matter of fact according to the ranking of priority assigned to the words by the dictionary, the milder meanings are the ones more generally associated with the terms than are the stronger implications.

We have already adverted to the fact that the Commission's opinions in this case do not attempt to lend any preciseness to the standard utilized. Even it recognized, however, that some limitation was in order. It attempted to supply this limitation when it stated (Final Decision, ¶ 22, R. 1424):

> ". . .Turning to the specific issue before us, this means that we cannot decide that some pattern of broadcasts is 'vulgar', 'suggestive', 'coarse', and 'susceptible of indecent, double meaning' on the basis of our own taste or preference for what we believe should be broadcast. What we must find is that the broadcasts in question are flagrantly offensive–that by any standard, however reasonably weighted for the licensee, taking into account the record evidence, the broadcasts are obviously offensive or patently vulgar."

It is difficult to see how injecting "obviously offensive" or "patently vulgar" adds any clarity or removes any ambiguity. The touchstone is still "vulgarity." Is the Commission suggesting that something is "obviously offensive" in a vulgar or coarse sense because it offends people's sensibilities of sex, dress, clothes, manner of speech, pride of family, pride of community or what? All of these elements are present in the dictionary definitions. They are not negatived by the Commission either in the words of the opinion or in the evidence upon which the Commission relied to find against WDKD under Issue 3.

The great bulk of the evidence upon which the Commission relied is contained in FCC Exhibit 2,(R. 423-434). Even a cursory reading of that Exhibit reveals several different strata of "vulgarity" as that term is defined in the dictionary.. Some of the material could be classified as "off-color" stories as that term is loosely used. Some of the material would be offensive to people of good taste by the careless, sloppy and slang type of language utilized by Charlie Walker. Some of the material could be objectionable to people's sense of local pride by the type of nicknames utilized to identify communities in the station's service area. [8] Considering the limitations imposed upon the Commission by Section 326 and the First Amendment it is inconceivable that the Commission would urge that all of the material referred to in Exhibit 2 is patently offensive. Yet nowhere does the Commission attempt to particularize what material is offensive and what aspect of public welfare it is attempting to protect. The Supreme Court has made it clear that the public welfare protected by the postal obscenity statutes is the social interest in sexual decency and the natural abhorrence of society to hard core pornography. Whether the Commission in the broadcast field is limited to the same standard is admittedly a difficult question. But this much is clear. Some particularization is essential, some delineation of the area of public welfare to be protected is essential.[9] This the Commission studiously avoids doing. Instead, it encompasses within its prohibition all the material referred to in Exhibit 2, thus placing a maximum deterrent on program material and letting other licensees guess as to just what aspects of so-called "vulgarity" they must eschew.

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[8] Illustrations are "Greasy Thrill" for "Greeleyville"; "Blood and Thunder Cross Roads" for "Hemingway"; "Stinkumville" in Georgetown; "Agony Alley" in Johnsonville; "Ann's Drawers" for "Andrews"; "Smooch me quick Cross-Roads" in Lake City; "Bloomersville" for "Bloomville"; "St. Stepins" for "St. Stephens".

[9] See Henkin "Morals and the Constitution: The Sin of Obscenity," 63 Columbia Law Review 391 (1963).

There are other elements of irrationality in the Commission's standard. In the Decision upon Rehearing, (R. 1582), it points out that its "patently offensive" standard has no applicability to religious[10] or controversial-issues broadcasts that may happen to offend some segments of the public. The rationale is not explained. Why is it all right to offend people's religious sensibilities but not their sensibilities of local pride? Why is one an aspect of the public welfare and the other is not? Some explication is desperately needed.

Finally the Commission's standard is defective because it gives no clue as to who is to judge what is "patently offensive".[11] It attempts to avoid arrogating the function to itself by saying that the material must be patently offensive. But patently offensive to whom? The Examiner forthrightly answered this question by indicating that it should not be the "literary cognoscenti;" (Conclusions, ¶ 7, R. 915) but must include "those of highly developed sensibilities"–the tots and the adults of tender sensibilities. The Commission does not repudiate this test. On the contrary, its object of solicitude is "the housewife, the teen-ager, the young child." (Final Decision, ¶ 21, R. 1424). The Examiner in applying his test would bar a program by a television station telecasting "a documentary, live, in depth, of the Song of Solomon." (Conclusions, ¶ 7, R. 915). The Commission presumably would follow this same reasoning–it did not reject it. What a sad commentary! The criticism of broadcasting as a "vast wasteland" is not predicated upon any daring excursions of programming into new fields. On the contrary, the criticism has been of sameness, safe programs, timidity of approach. Yet the

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[10] ACLU finds it quite anomalous for the Commission in its Opinion on Petition for Rehearing to exclude from its prohibition religious broadcasts which are offensive to segments of the public when in its previous opinion it relied upon the Court's opinion in Trinity Methodist Church, South v. Federal Radio Commission; 61 App. D. C. 311, 62 F. 2d, 850 (1932); cert. den. 284 U. S. 685–where material offensive to religious sensibilities was one of the grounds relied upon for denial of license.

[11] See Lockhart & McClure "Censorship of Obscenity: The Developing Constitutional Standards" 45 Minnesota Law Review 5 (1960).

same agency that criticizes broadcasters on this score is one that in the next breath cautions licensees that they must not put on programs that are judged patently offensive by the standard of acceptability to housewives, teen-agers and children.

The Supreme Court in Butler v. Michigan, 352 U. S. 380 (1957) sternly repudiated an effort by Michigan which prevented adults from obtaining books which could have a potentially deleterious effect on youth, saying (at 383) "Surely, this is to burn the house to roast the pig." The Commission unfortunately appears to adopt the same attitude that was rejected in Butler. There are several classes of broadcast stations, AM, FM and TV. Some are in small cities and some in large metropolitan areas. Some cater to a general audience and some to a specialized audience. There is one whole class of broadcast station which by regulation must be utilized for non-commercial educational purposes–their audiences are invariably adults of a highly educated level. Stations broadcast from early morning to late at night. The composition of the audience differs. Indeed the Commission recognizes this fact by requiring a separate program showing for each of the periods of the day–8:00 a.m. to 6:00 p.m.; 6:00 p.m. to 11:00 p.m.; and 11:00 p.m. to 8:00 a.m. Yet the instant case with a broad brush paints the same standard for all situations. For the non-commercial educational station as for the regular station; for the 10:30 p.m. audience as for the 5:30 p.m. one–each licensee is admonished to judge his material on the basis of what may be patently offensive to housewives, teen-agers and children. ACLU cannot believe that even the Commission intended this result. Yet its vague standard accomplishes just such a result.

The Commission never meets the problem of standards head-on. Instead, it attempts to frighten the public and intimidate the reviewing court by urging that if it cannot deny WDKD a renewal of license on the record in this case "a station could present, for 75% or 80% of its broadcast day, entertainment which consisted of records interspersed with the type of smut set out in the Examiner's Initial Decision. . .; it would

nevertheless be of no concern of the Commission at the time of renewal" (Final Decision, ¶ 21, R. 1423).

This is just not an appropriate way of putting the problem. In the first place, it appears to be an attempt by the Commission to imply that its decision on Issue 3 is somehow or other based upon the absence of balance in WDKD's programming. This is not the case. The matter of balance is covered by Issue 4 and on this score, the Commission concluded that the performance while not entirely satisfactory was not of such inferior quality as to warrant deletion of the license.

In the second place, the Commission's argument is not a delineation of standards or particularization of conduct which is to be avoided. Instead, it attempts to substitute pejorative words for clear standards in the hope that the implication will be so shocking as to compel agreement with its result. But the effort is fruitless. Who would urge, for example, that it would be in the public interest for a station to devote 75% of its programs to "unpatriotic" programs. But would anyone seriously undertake to defend a deletion of license based upon the broadcasting of "unpatriotic" programs where no precise definition of the term is spelled out–a definition reasonably clear in its applicability and logically related to substantive matters as to which the Commission has control. The term can run the full gamut of deliberately furnishing information of aid to the enemy, to presenting in a relatively laudatory manner the accomplishments of a country with which we have no diplomatic relations, or to caustic criticism of some of the policies of our own government.

The Supreme Court has been quite intolerant of efforts of state authorities to substitute pejorative words for clear and unambiguous standards which satisfy the Constitution. Some of these efforts which have been struck down are "sacreligious" (Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); "harmful" (Superior Films, Inc. v. Dept. of Education, 346 U.S. 587 (1954); "of such character as to be prejudicial to the best interests of said City" (Gelling v. Texas, 343 U.S. 960 (1952);

"so massed. . .as to become vehicles for inciting violent and depraved crimes against the person" (Winters v. New York, 333 U.S. 507 (1948). The motivation behind the above "standards" is no different from that sought by the Commission. But good intentions are no substitute for clarity and precision. When the First Amendment is involved, the repressing authority must meet a strict standard to make sure that in its efforts to snuff out evil practices it does not unconstitutionally suppress free expression.

Our concern with the Commission's standard is that it does shackle free expression. It may be argued that the type of program material in the Charlie Walker programs is of such minimal value that its removal from the air should be of no concern. Our concern is not for Charlie Walker or WDKD but for the protection of free expression. As the Supreme Court has made clear, when the standard is vague, repressive action must fail no matter how little social or cultural value there may appear to be in the questioned material. Winters v. New York, supra.

The result of a vague standard is unpredictable. In this case the Commission found the material patently offensive because it labelled the material as "smut" interspersed between records. To a conscientious licensee who eschews the Charlie Walker type of program, would this pronouncement be of any useful guidance in helping him to decide whether he could broadcast a genuine work of literature containing "offensive" language of the type proscribed here? Could he safely broadcast a play which appeared to extol the virtues of adultery? Could he broadcast a documentary based upon "Song of Solomon"? No reasonable person reading the Commission's decision could answer these questions with assurance. There is no procedure for a licensee to obtain advance advisory rulings on the propriety of programs. He must make a judgment and run the risk of subsequent Commission scrutiny. With the stakes so high, with the risk so great, with the standard so flabby, most licensees will take the safe route and avoid material which this Commission or a

subsequent Commission might find objectionable. Such repression is abhorrent to the First Amendment.

II. The Court Should Remand The Proceeding To The Commission For Further Consideration Of The Misrepresentation Issue

The Commission as a second and separate ground for deleting the license of WDKD relies upon the alleged misrepresentations and lack of candor–Issue 1–on the part of the licensee. ACLU urges the Court to remand the proceeding to the Commission for further consideration on this issue. We do so for two reasons.

In the first place, ACLU cannot help but believe that despite the strong statements by the Commission as to misrepresentation being a separate and independent ground for denial of license, the whole proceeding was colored by the strength of the Commission's feeling with respect to the vulgarity issue. The Examiner made no bones about it in his opinion. While the Commission itself is more restrained in its language than the Examiner, the strength of its feelings on "vulgarity" shines through both of its opinions in this case. We cannot help but feel that some members of the Commission who voted for denial of license might very well have arrived at a different conclusion if they had known at the time of voting that the vulgarity issue as phrased could not be relied upon by the Commission as a ground for denial of license.

In the second place, the misrepresentation issue is inextricably bound up with the vulgarity issue. It started out that way and remained intertwined throughout the proceedings. Note how the matter all started. The Commission received complaints concerning certain broadcasts by Charlie Walker over WDKD. It wrote to the station advising it of the receipt of the complaints, pointing out that the complaints alleged "that said programs are vulgar and suggestive, and are susceptible of double meanings with indecent connotations" (R. 211). By this time the Commission presumably already had in its possession the tapes of the

broadcasts and had made a prima facie determination that the programs were vulgar. It is difficult to see why the Commission did not forward to the licensee a dub of the tapes or a transcript thereof with the simple request that the licensee admit or deny that the broadcasts took place and give the station an opportunity to submit any explanation it desired. Instead, it followed the most unsatisfactory method of asking the licensee to comment on whether any Charlie Walker broadcasts were vulgar. When it is remembered that Charlie Walker had been broadcasting over the station for some nine years and that the program was on the air for some four hours a day, it was not at all unreasonable for the licensee to ask the Commission for permission to listen to the tapes before making a reply. This request was refused. There is no valid excuse in the record for the refusal. Accordingly, the licensee was left to his own devices to try to figure out what period of time was involved and to guess what the Commission meant by the indeterminate term "vulgar", etc.

It is not necessary to hold a brief for the licensee or for the manner in which he conducted himself in the hearing to argue that the Court should not condone the type of procedure which was followed here. The Commission procedure almost smacks of entrapment. Instead of asking the licensee whether he had broadcast vulgar material, the Commission should have forthrightly set forth the complained-of material. No legitimate administrative purpose would have been thwarted by such a procedure, and the licensee from the outset would have been on notice as to the exact subject matter of the controversy. Had the licensee denied carrying the programs in question–when specific content thereof had been called to his attention–there could be no room for argument as to the existence of misrepresentation if the evidence showed that the broadcasts had in fact been carried and that the licensee had knowledge to this effect. However, the initial query by the Commission instead of asking for facts asked for conclusions–did you carry vulgar broadcasts? The very phrasing of the question almost compelled a negative answer.

Otherwise, the licensee would have had to search through his memory to locate any possible programs which could possibly be termed vulgar by the Commission. Before giving a negative answer to such a query, the licensee would have to be satisfied first that by his own standards none of the material was vulgar and secondly, that the Commission or its staff would regard all the material as non-vulgar. To be "candid" by the Commission's standards would have required the licensee to bring to the Commission's attention all material which could conceivably be considered vulgar and advise the Commission that the licensee did not regard the material as vulgar but submit it for the Commission's consideration. What an unfair method of initiating program inquiries when a simple and forthright procedure was available!

ACLU submits that the misrepresentation issue in this case raises serious policy considerations which militate against an outright affirmance of the Commission's action. We urge the Court to remand the issue to the Commission for further consideration.

CONCLUSION

For the foregoing reasons it is submitted that the Court should reverse the determination of the Commission on Issue 3 and should remand Issue 1 to the Commission for further consideration in the light of the Court's opinion.

Respectfully submitted,

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August, 1963

APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,587

E. G. ROBINSON, JR., tr/as
PALMETTO BROADCASTING COMPANY (WDKD),

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from a Decision and Order of the
Federal Communications Commission

September 16, 1963.

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COMPANY (WDKD)

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APPELLANT'S REPLY BRIEF

Lest fundamentals be obscured by minutiae, we will forego a sentence-by-sentence critique of appellee's 67 page answering brief. A reply, in which we summarize the four legal propositions which we here deem basic, with a showing in what particulars appellee's contentions depart therefrom, followed by a brief discussion of the so-called misrepresentation issue, will (we believe) be of greater assistance to the Court.

I

THE CONSTITUTIONAL AND DELEGATION PROBLEM

As stated in more detail in our opening brief (App. Br. pp. 13-26), the following legal principles are, in our opinion, fully supported by recent holdings or by well-considered dicta of the Supreme Court:

A. Basics

1. The guarantees of the First Amendment extend to radio and television — to entertainment as well as to news programs, and to those commercially sponsored as well as those presented on a sustaining basis, a point on which the participants in the instant appeal are in agreement, though to date we lack a square-cut holding of the Supreme Court to that effect. See App. Br. pp. 14-15; FCC Br. pp. 52-53; ALCU Br. p. 13 and authorities there cited.

2. As recognized in our opening brief (App. Br. p. 15), because of multiple conflicting demands for the same facilities, a licensing system is unavoidable in the radio field (cf. FCC Br. p. 50). But from this concession it does not follow, in this day and age when a "license", "permit", or "franchise" of some sort is needed in connection with substantially every business or occupation a person may engage in, that the guarantees of the First Amendment become a nullity merely because a government license may be required. And if we read their brief aright, counsel for the Commission make no such contention (FCC Br. p. 55, fn. 45). Nor do we understand counsel for the Commission to argue from the mere fact that the airwaves are publicly owned, any more than from the fact the streets, highways, parks and the postal system are publicly owned, that the Federal Government can thereby impose conditions on their use which but for that fact would contravene the First Amendment. Kunz v. New York, 340 U.S. 290 (1951); Hannegan v. Esquire, 327 U.S. 146 (1946).

3. Any delving into program content[1] by governmental agencies, except under narrowly drawn statutes addressed to conduct which government may control, contravenes the First Amendment. As four present Justices have categorically asserted (Warren, C. J., Black, Douglas, and Brennan, JJ.), a point on which the three remaining Justices who are still on the Court expressed no disagreement, Supreme Court decisions to date sustaining restrictions on freedom of speech and press, whether by licensing or other methods, "do not deal with the content of the speech; they deal only with the conditions surrounding its delivery." Time Film Corp. v. Chicago, 365 U.S. 43, 78 (1961) (emphasis in the original). Where administrative agencies, be they federal or state, in the exercise of their licensing functions, "judge the content of the words and pictures to be communicated," the safeguards of the First and Fourteenth Amendments become applicable save in the exceptional case. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952). A violation of the First Amendment arises where a governmental agency "undertakes to censor the contents of the broadcasting." Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J. concurring). And as a majority of the Supreme Court has explicitly noted in a radio case, "any examination of thought or expression to prevent publication of 'objectionable material'" is censorship. Farmers Union v. WDAY, Inc., 360 U.S. 525, 527 (1960) (emphasis by the Court).[2]

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[1] "Programming" and "program content" are not necessarily interchangeable terms. As we shall see, an examination into programming to determine whether "equal time" has been afforded all candidates for the same office under a specific standard embodied in 47 U.S.C. Sec. 315 is one thing. An examination into the content of such programming to determine whether the views therein expressed are or are not "objectionable" (under some "norm" prescribed by a governmental official) is something else. Hannegan v. Esquire, 327 U.S. 146, 157 (1946).

[2] As we have already pointed out (App. Br. pp. 18-19), licensing is the classic method of previous restraint, and any law imposing a penalty ("lifted eyebrow" or otherwise), as does the Communications Act, for operating without such a license is a form of previous restraint. See Kunz v. New York, 340 U.S. 290 (1951) where a permit had been revoked because the permittee had ridiculed and denounced certain religious beliefs; cf. Bantam Books, Inc. v. Sullivan, 31 Law Week 4192, 4195 (U.S. Sup. Ct. 1963).

4 . "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 31 Law Week 4063, 4067 (U.S. Sup. Ct. 1963). As a consequence, the decisions of the Supreme Court furnish examples of standards "in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." Smith v. California, 361 U.S. 147, 150-151 (1959). Or as well stated by Justice Douglas, in dissent, "When the exercise of First Amendment rights is tangled with conduct which the government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistence is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control." United States v. International Union, 352 U.S. 567, 596 (1957). In short, the mere fact that the broad standard of "public interest, convenience, and necessity" has been sustained in situations such as where the Federal Communications Commission has denied licenses on interference grounds, it does not follow that this standard, which must be read in pari materia with the "no censorship" provisions of Section 326 of the same statute, is sufficiently precise were the Commission to attempt thereunder to deny licenses because of "overcommercialization," "not enough public service programming," "too many Westerns," "too much shooting," or "not enough religion." If these matters are current evils of such moment that a majority of the Supreme Court would sustain a "narrowly drawn" Congressional enactment in this field as not itself impinging on First Amendment freedoms, it seems patent that the general touchstone of "public interest" is far too broad to warrant the adoption of administrative rules or policies along these lines absent such legislation.

The Commission in the brief which it has here filed seeks to extricate itself from the foregoing well-considered doctrines of the Supreme Court in two ways: First, it misstates the thrust and scope of appellant's

argument (FCC Br. pp. 33, 52), and it then contends that in any event "radio is different" (FCC Br. pp. 52-56). We buy neither approach.

B. The Narrow though Important Issue Here Presented

The instant appeal arises out of a renewal proceeding for a station which has now been on the air some fourteen years. There was then and there is now no competing application for the frequency in question. In connection with three of the four factual issues specified in the hearing (Issues 2, 3, and 4), and to a lesser degree in connection with the remaining issue (Issue 1), the Commission delved into "program content" (App. Br. pp. 26-48), found such content to be "offensive," "and thus contrary to the public interest" (R. 1424-1425, paras. 22 and 23).

As we took pains to point out in our opening brief (App. Br. p. 33), it is our position that the action here challenged is improper because it was bottomed on an examination into program content under a general "public interest" standard (i.e., that the content was "offensive" and ergo contrary to the "public interest"), with the Supreme Court on record that it has not condoned, because of the provisions of the First Amendment, any delving into program content, and with that Court insisting on narrowly drawn legislation where First Amendment rights are entangled with evils which Congress may in some degree regulate.

We did not in our opening brief (App. Br. pp. 32-33), and do not here, contend, that in some areas and situations where Congress has already legislated with requisite specificity, the Commission may not look at programming, and even at program content not safeguarded by the First Amendment. Contrary to assertions in the Commission's brief (FCC Br. p. 33), it is only in those situations, as here, where narrowly drawn legislation has not been enacted, and where the Commission, in delving into program content, is perforce compelled to fall back on the broad standard of "public interest," thereby inhibiting freedom of

expression, that we claim a violation of the First Amendment and of the prohibitions embodied in 47 U.S.C. Sec. 326.

In numerous program areas, as we noted in our opening brief (App. Br. pp. 32-33), Congress has already legislated with adequate specificity. For example, at the same time in 1934 that it made "public interest" the touchstone for issuing licenses and proscribed the promulgation by the Commission of any "regulation or condition . . . which shall interfere with the right of free speech by means of radio communication" (47 U.S.C. Sec. 326), Congress expressly interdicted the utterance of "any obscene, indecent, or profane language, by means of radio communication" (formerly the last sentence of 47 U.S.C. Sec. 326), and the broadcasting of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance" (formerly 47 U.S.C. Sec. 316). Although these provisions were subsequently removed from the Communications Act and reenacted as part of the Criminal Code (18 U.S.C. Sec. 1304 and 1464), Congress has since explicitly empowered the Commission, with respect to each of these criminal offenses and with respect to "fraud by wire, radio or television" (18 U.S.C. Sec. 1343), to revoke a license "for violation" of those particular sections of the Criminal Code (47 U.S.C. Sec. 312(a)(6)), and to issue cease and desist orders against any licensee who has "violated or failed to observe" those criminal provisions (47 U.S.C. Sec. 312(b)), with a further right to revoke a license for any subsequent violation of a final cease and desist order issued in connection therewith (47 U.S.C. Sec. 312(a)(5)).

Thus, if the Commission were to revoke a license, because of proved violations of the obscenity, lottery and fraud provisions of the

Criminal Code (matters not safeguarded by the First Amendment),[1] or if the Commission after first issuing a final cease and desist order, thus forewarning the licensee, found that he thereafter persisted in such broadcasts,[2] the Commission would not be delving into program content nor taking such action under a broad "public interest" standard; it would be proceeding under specific statutory provisions which Congress has enacted covering those particular evils (47 U.S.C. Sec. 312). Hence, we have no quarrel with Federal Communications Commission v. American Broadcasting Co., 347 U.S. 284 (1954) cited by the Commission (FCC Br. p. 38, fn. 29), where the Supreme Court stated, dicta

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[1] Unlike its Examiner, the Commission expressly denied that the language it used in Issue 3 ("coarse, vulgar, suggestive, and susceptible of indecent, double meaning") is to be equated with "obscenity" as used in 18 U.S.C. Sec. 1464 (R. 1422, para. 19), a fact which Commission counsel admits (FCC Br. p. 17, fn. 8). Thus, the "content" which the Commission found offensive under Issue 3 was something less than "obscenity," and normally, therefore, within the protection of the First Amendment.

[2] That Congress is of the view that licensees should, in most circumstances, be forewarned is clear not only from the 1960 amendments thus added to Section 312 of the Communications Act (47 U.S.C. Sec. 312), when revocation (except for the three crimes there specified) was limited to a subsequent violation of a previously issued cease and desist order which had become final, but also from Section 9(b) of the Administrative Procedure Act (5 U.S.C. Sec. 1008(b)). There Congress stated: "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." As pointed out in the Attorney General's Manual on the Administrative Procedure Act (1947), prepared under the direction of Judge Washington before his elevation to this Court, it was the intention of this provision of the APA that a licensee normally should be accorded "another chance" (p. 91). Robinson was not forewarned nor accorded a second chance in this case. That the Examiner was disturbed, with WDKD's license regularly renewed for more than a decade and with Walker an employee of the station most of that period, that Robinson had not been "forewarned" is clear from his decision (R. 922, Concl. 19), a matter to which we had occasion to advert in our opening brief (App. Br. pp. 8, 47). To all intents and purposes, having delayed almost a year after receiving the tapes, during which WDKD's license expired, and with no competing applicant for the facility, the instant renewal proceeding is tantamount to a revocation proceeding to which 5 U.S.C. Sec. 1008(b) should apply.

though it be in that case, that the Commission could deny a license for the violation of the lottery statute.

Elsewhere, in the 1934 statute, Congress specified that where a broadcaster allows his facilities to be used by a candidate for public office he must provide "equal opportunities" to all other candidates for that office, with "no power of censorship over the material broadcast under the provisions of this section" (47 U.S.C. Sec. 315). Accordingly, if the Commission were to refuse to renew a license because a broadcaster willfully and deliberately failed to afford "equal time" to all candidates for the same office, or because he censored speeches they made over his facilities, the Commission would be proceeding under explicit provisions of 47 U.S.C. Sec. 315, and not under the vague and all-embracing concept of "public interest." Thus, the case of Farmers Union v. WDAY, Inc., 360 U.S. 525, 534-535 (1960), which the Commission cites (FCC Br. p. 48, fn. 40), pertains to a matter on which Congress has legislated with specificity (47 U.S.C. Sec. 315), and hence has no direct applicability here.

Likewise in 1934, Congress placed on the Commission the duty of apportioning broadcast facilities equitably and efficiently "among the several states and communities" (47 U.S.C. Sec. 307(b)), in recognition of "local needs for a community radio mouthpiece." Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 362 (1955). Accordingly, we have no quarrel with the Commission's refusal, in line with that explicit mandate, to grant a license to an applicant in the midwest who proposed to operate his station as a spigot for the carrying of network programs originating out of New York. Simmons v. Federal Communications Commission, 83 U.S. App. D.C. 262, 169 F.2d 670 (1948), cert. den. 335 U.S. 346 (FCC Br. pp. 21, 45, 49, 55, 63, 64)).[1]

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[1] In this connection it is to be remembered that the Communications Act likewise explicitly empowers the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting" (47 U.S.C. Sec. 303(i)).

And as a necessary corollary of the Section 307(b) mandate, the Commission may refuse to grant a license to an applicant who has no familiarity with the needs of the community applied for, and so far as record there showed made no attempt to acquaint himself with those needs, though it should be observed in passing that this Court expressly skirted the "program content" matter. Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 260, 302 F.2d 191, cert. den. 371 U.S. 821 (FCC Br. pp. 21, 45, 63).[1]

To round out this discussion, though the Commission's brief cites no court decision on the point, Section 317 of the Act requires broadcasters to make announcements concerning payments received for and the source of certain material broadcast over their facilities. Assuming (as we do) that this statutory requirement does not impinge on the First Amendment, if the Commission were to examine into "content" to determine whether those requirements have been fulfilled, it would be proceeding under a narrowly drawn statutory standard to reach evils which government may regulate (47 U.S.C. Sec. 317).

In short, except for two cases, the parade of citations contained in the Commission's brief in support of its asserted authority to examine into programming and program content (FCC Br. pp. 38-56),

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[1] As noted by the Commission (FCC Br. p. 37, fn. 27), appellant had no occasion in his opening brief, under the issue here presented, to go into the Commission's power to consider programming in comparative proceedings where the applicants themselves assert differences on that score, and where the Commission is thus required to make findings on those asserted differences. Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949) (see FCC Br. p. 37). Provided those findings and conclusions are bottomed on evidence going to the needs of the community in question, and to the ability and likelihood of the applicant's fulfilling those needs (in line with the specific mandate of Section 307(b)), and not on the personal preferences of individual Commissioners for a given type of programming, we have no reason here to quarrel with the conclusions reached in the few Commission cases where "programming" has been determinative in comparative proceedings and where this Court has affirmed the results thus reached (see FCC Br. pp. 45-46, 49, and cases there cited).

when carefully analyzed, all relate to areas where Congress has already legislated with requisite specificity (e.g., 47 U.S.C. Sec. 307(b), 312, 315, 317). In those cases, unlike here, the Commission was not examining into program content under a broad standard of "public interest," so as to reach alleged evils not covered by narrowly drawn legislation, and thus was not impinging on the basic guarantees of the First Amendment and the protections provided by 47 U.S.C. Sec. 326.

The two exceptions, which we too discussed in our opening brief (App. Br. pp. 13, 25, fn. 1), are the KFKB and the Trinity cases decided by this Court in 1931 and 1932, with the first decision antedating what the Supreme Court itself has since termed the "landmark" case of Near v. Minnesota, and with the rationale of both cases difficult to square with more recent Supreme Court pronouncements on which we here rely. It was those two cases of this Court which the Commission itself cited in support of the action here challenged (R. 1423, para. 32), and not the subsequent cases of this and other Courts which counsel for the Commission erroneously cite in "confirmation" thereof (FCC Br. p. 42). It is those two cases, and more particularly the rationale thereof (cf. App. Br. p. 25, fn. 1), which we have asked this Court to reexamine in the light of more recent Supreme Court pronouncements.[1]

In doing so, we are not asking this Court to reverse intervening decisions in program areas where Congress has already legislated with

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[1] It may not be without interest and significance that during the past Term of the Supreme Court (in No. 392), the Commission cited the same cases and authorities as are paraded here, for the proposition that it has exclusive jurisdiction over programming and advertising content of radio broadcasting, relying principally on the "public interest" standard laid down in the Communications Act and its licensing functions thereunder. Head v. New Mexico, 31 Law Week 4643 (U.S. Sup. Ct. 1963). In rejecting that contention, the Supreme Court said (pp. 4644-4645):

> Assuming this to be a correct statement of the Commission's authority [i.e., that the Commission may consider and regulate advertising content] we are not persuaded . . . The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulations of professional advertising [by optometrists], particularly when the grant of power was accompanied by no substantive standard other than the "public interest, convenience, and necessity."

requisite specificity. Thus, the issue here is a relatively narrow, though highly important one — the extent to which the Commission may (as here) delve into program content in the absence of any asserted standard more substantive than "public interest, convenience, and necessity." That the Federal Communications Commission, as contrasted with the Federal Radio Commission, has not from 1934 until the action here taken denied renewals by delving into program content under the broad standard of "public interest" is not seriously disputed. But with the present Commission claiming authority to move into this area, notwithstanding the prohibitions of the First Amendment and 47 U.S.C. Sec. 326, important delegation and free speech issues are presented which should be reexamined in the light of the Supreme Court's evident concern with any erosion of our basic First Amendment freedoms.

Having thus shown that the Commission's brief sets up and then demolishes a "bogey man," wholly irrelevant to the issue here presented, we proceed to their contention that broadcasters are second-class citizens so far as First Amendment freedoms are concerned, and that the safeguards of the First Amendment, as enunciated by the Supreme Court with respect to other media of communication, are not binding on the Commission because, mirabile dictu, it has been empowered by Congress to function in the "public interest."

C. Radio Is Not Different

Seizing upon the statement in Burstyn (343 U.S. 495, 502-503) that each media of communications has "its own peculiar problems" and that motion pictures are not "necessarily subject to the precise rules governing any other particular mode of expression," Commission counsel argue that radio and television are different from other media (FCC Br. pp. 52-56). Adverting to the impact of radio and television on housewives and teenagers (FCC Br. p. 23) and to a scarcity of frequencies (FCC Br. pp. 50-51), they contend that the Commission can act under a broad

public interest standard in the field of radio and television, though (as they frankly recognize) such action would not be permissible under doctrines laid down by the Supreme Court in "free speech" cases dealing with other means of communicating thoughts and ideas, such as newspapers and book publishers (FCC Br. pp. 22, 52, 54, 55, 56).

To such a contention there are several answers. In Burstyn the Court held that the standard laid down by the New York statute (prohibiting the showing of "sacrilegious" films) was lacking in specificity and accordingly contravened the First Amendment. Thus, the statements in that case concerning the degree of protection afforded motion pictures was at best dicta. But what is more significant for present purposes, immediately following the language thus relied on from Burstyn (FCC Br. p. 53), the Court was careful to state (343 U.S. 495, 503):

> But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule.

It is not without significance, in two instances where state legislation was aimed particularly at protecting the sensitivities of youth, the Supreme Court has nonetheless applied First Amendment fundamentals. Only last Term, in Bantam Books, Inc. v. Sullivan, 31 Law Week 4192, 4194, 4196 (U.S. Sup. Ct. 1963), proscribing the "lifted eyebrow" techniques of the "Rhode Island Commission to Encourage Morality in Youth," the Court noted that the line between "obscenity" and something less than "obscenity," even though aimed at protecting the morals of youth, must be drawn under "the most rigorous procedural safeguards," including (as Mr. Justice Douglas stated in his concurring opinion) "all the procedural safeguards of the Bill of Rights, including trial by jury." Language there used, because of its applicability here, merits quotation in extenso (31 Law Week 4192, 4194-4195):

> . . . the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments . . . '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .' But, it is contended, these salutary principles have no application to the activities of the Rhode Island Commission because it does not regulate or suppress obscenity, but simply exhorts booksellers and advises them of their legal rights . . . But though the Commission is limited to informal sanctions . . ., the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim.

And in Butler v. Michigan, 352 U.S. 380 (1957), where the state of Michigan sought to ban publications having a particularly deleterious effect on youth and which at the same time prevented adults from obtaining such books, the Court said (p. 383):

> The state insists that, by thus guaranteeing the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig . . . We have before us legislation not reasonably restricted to the evil with which it is said to deal.

More importantly, and this is the basic fallacy in the Commission's line of reasoning, the language from Burstyn -- that each medium of communication has its problems and that one medium may not necessarily be subject to precisely the same rules governing another medium -- merely proves that Congress may enact narrowly drawn legislation which might not contravene the First Amendment under the circumstances that

exist in one medium, whereas identical legislation dealing with different media would. As Burstyn states and holds, the basic principles of freedom of speech do not vary with the media. Freedom of expression is the rule, and any legislation impinging on such expression must be "narrowly drawn" to meet a particular evil which government may control, so that First Amendment rights will not be unduly or needlessly sacrificed. As the Court expressly stated in Burstyn (343 U.S. 495, 502):

> It is further argued that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures would be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here [under the vague standard of "sacrilegious"].

Thus, the fact that Congress in the field of radio and television, with a licensing system unavoidable, might enact narrowly drawn legislation which would not contravene the First Amendment whereas comparable legislation in certain other fields would, does not mean that the Commission under the broad standard of "public interest" can delve into "program content," any more than could the New York Department of Education under the standard "sacrilegious," or the Mayor and City Council of Baxley under a "character" and "general welfare" standard. Staub v. Baxley, 355 U.S. 313, 321 (1958).

With the language from Burstyn on which Commission counsel relies not standing for the proposition that "radio is different," so far as the basic commands of the First Amendment go, and absent narrowly drawn legislation directed to evils which government may control, Commission counsel may have conceded more than they intended when they state (FCC Br. p. 55, fn. 45):

> We need not disagree with appellant's contentions that the First Amendment protects entertainment programs (Br. 14), that the need for licensing does not remove the functions of the First Amendment (Br. 15), that the Commission does not have carte blanche authority (Br. 16), that the Commission may not merely "impose its own program views and tastes" (Br. 16), that the First Amendment protects speech from subsequent punishment as well as previous restraint (Br. 17), that the previous restraints generally are frowned upon (Br. 18), or that censorship through licensing of speech by administrative agencies is generally undesirable (Br. 18-23).

As we have shown, under doctrines enunciated by the Supreme Court, though a broad standard be adequate in other contexts, it cannot be applied in the radio field any more than in other fields, where it collides with the basic commands of the First Amendment, until Congress first legislates with specificity on that score.[1]

In short, we do not buy Commission counsel's ipse dixit (FCC Br. p. 56) that "no purpose would be served by requiring of Congress" a more specific standard in those situations where the Commission desires to delve into program content. As Judge Friendly has demonstrated in

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[1] On close analysis, except in one particular, appellant's views and those expressed by ACLU are not far apart. The one area of difference is ACLU's contention that the Commission, using the "public interest" standard, may by rule-making promulgate specific regulations to which effect may thereafter be given in individual proceedings, whereas we contend that with Congress having laid down specific standards in certain program areas and not in others, the Commission may not lift itself by its own bootstraps by adopting regulations impinging on First Amendment freedoms. We are further persuaded to this view by the fact that Congress, after stating in 47 U.S.C. Sec. 326, that nothing in the Communications Act shall be understood or construed to give the Commission the power of censorship over radio communications, went on to state in that same section of the Act that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications." Thus, in our view, the promulgation by the Commission of a "regulation or condition" interfering with the right of free speech otherwise assured by the First Amendment is foreclosed by the final portion of 47 U.S.C. Sec. 326. And it is not without significance, that although Congress has since relaxed this prohibition in one program area ("political broadcasts" under 47 U.S.C. Sec. 315(c)), it has not seen fit to do so in others.

his scholarly article in the Harvard Law Review, there is an urgent need for a better definition of standards in connection with the activities of Federal administrative agencies.[1] And as President Sylvester C. Smith, Jr., of the American Bar Association had occasion to note in his retiring speech this summer, Federal administrative agencies, rather than request specific legislation from Congress, are all too prone to erogate unto themselves additional powers by stretching those already conferred.[2] With Congress in session most months of the year, and with basic First Amendment liberties at stake, it is not asking too much, in situations where those liberties will inevitably be eroded if the Commission is allowed to examine into program content under a standard as broad as the "public interest" touchstone under which it functions in other settings, to require the Commission to go back to Congress for legislation narrowly drawn and strictly confined to those limited matters with respect to which Congress may legislate without itself running afoul of the First Amendment.

II

THE MISREPRESENTATION ISSUE

As noted in our opening brief (App. Br. p. 35), this renewal proceeding arose out of suggestive material allegedly contained in certain of Charlie Walker's broadcasts (Issue 3). The Examiner who heard the subsequently adduced evidence thought this case "a close one" and that Issue 3 (offensive broadcasts) was the "pivotal" issue. The length to which the Commission below, and the Commission counsel here, have gone in an effort to repudiate the Examiner's views on these points and to "shore up" a bold and unauthorized foray into program content, by attempting to buttress the result on other (though not in fact independent)

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[1] Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 1055 (1962).

[2] 49 ABA Journal 848-849 (Sept. 1963).

grounds, gives added meaning to warnings (by five present Justices of the Supreme Court) of the dangers inherent in a censor or licensor acting as both prosecutor and judge.

As heretofore noted (App. Br. pp. 34-35), where fundamental guarantees of the Bill of Rights are involved, findings made by an administrative agency that is investigator, prosecutor, judge, and jury are by no means insulated against examination by this Court. Where state courts, in a not dissimilar fashion, have attempted to shore up encroachments on the Bill of Rights, by seeking to base the result on a non-federal ground on which findings were duly made, the Supreme Court has not hesitated to take a look at those findings. This Court should do so here.

The so-called "misrepresentation issue" (Issue 1), which the Commission would equate with WOKO, was an exceedingly narrow one, as we have heretofore shown (App. Br. pp. 35-36), namely, whether Robinson in certain statements made to the Commission before the hearing was ordered had misrepresented certain facts. Thereafter, in response to a formal request that the "statements" on which the Commission was relying be identified by date, by substance, by whom and to whom made (R. 108 K - 108 N), the Commission listed by date four written statements made by Robinson, with no reference there made to a May 20 letter by Robinson's then attorney (R. 174, para.7) — a letter to which the Commission below and its counsel here now seem to attach great importance. The contention here made (FCC Br. p. 28, fn. 15) that the word "includes," as used by the Commission in its enumeration of documents in response to appellant's request for a bill of particulars, did not purport to "exclude" other unmentioned documents appears to the undersigned, and we trust the Court, to be indefensible and shocking.[1]

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[1] If the Commission wishes to resort to semantics, it could be pointed out that the May 11, 1960 letter merely stated that the licensee was being afforded an "opportunity" to submit a statement, and merely "requested" him to submit such

(Footnote continued on following page)

That counsel's letter of May 20 was not intended as a reply to the matter raised in the May 11 inquiry is apparent from the statement contained therein (R. 212) that "in order to reply to your letter of May 11th," she needed to listen to the tapes in the Commission's possession, to which she had been refused access, and which she was there formally requesting permission to hear.

Thus, the only written statement listed in its response to the bill of particulars and on which the Commission stated it was relying (and on which it now relies — other than counsel's letter of May 20) was Robinson's reply of June 10 to the May 11, 1960 inquiry. In that letter Robinson stated that he had received from his counsel "several quotations from the taped shows" (eight items), that "these statements were made by my employee, Charlie Walker, were not known to me," and that he (Robinson) was not acquainted until he received these quotations from his attorney "of the nature of the statements made by Charlie Walker" (WDKD Ex. 6, R. 215). Certainly a literal, permissible, and altogether natural construction of the June 10 letter would be that it dealt only with the eight items from the tapes which his counsel forwarded to him on June 8. If the Commission deemed the June 10 letter a too narrow response to their May 11 inquiry, to which they afforded Robinson an "opportunity" to submit a statement, the Commission could and should have then and there said so. We can assure this Court that "follow-up" requests by the Commission are not uncommon.

(Footnote continued from preceding page)

[1] a statement (WDKD Ex. 3, R. 211). The Commission did not direct, as it frequently does. Nor did it request a reply under oath, as it frequently did, prior to the statutory change effective in September 1962. And in stating that it had received certain complaints that Charlie Walker's programs were allegedly "vulgar and suggestive" and asking Robinson for a statement "with respect thereto" (R. 211), did the Commission want an opinion from Robinson whether the tapes in its possession were "vulgar and suggestive," or what? However, unlike the Commission, we choose not to rely on such semantics.

If the June 10 letter be read according to its natural tenor (i.e., as pertaining to the eight items from the tapes furnished Robinson by his attorney), neither the Commission below nor its counsel here make any claim that the subsequently adduced evidence even remotely proved that Robinson had any previous knowledge of those particular items. Thus, if his June 10 letter is so read, it certainly cannot be contended that misrepresentation was proved under Issue 1: "To determine whether in the written or oral[1] statements to the Commission with reference to the above matters [the contents of Walker's broadcasts], the licensee misrepresented facts and/or was lacking in candor" (R. 106-107). Accordingly, if the Court accepts our view of the June 10 letter, Issue 1 is eliminated from this case and the Commission's efforts to immunize from judicial review its unauthorized forays into program content in connection with Issues 2, 3, and 4 are thus thwarted.

It is only by placing on the June 10 letter a much broader interpretation than the language there used, or alternatively by asserting that the letter was so incomplete a response as to be lacking in candor, that it even becomes necessary to look at the subsequently adduced evidence so far as it pertains to misrepresentation or lack of candor. However, even meeting the Commission on their own ground we deny that misrepresentation was here shown.

Both the appellant in his opening brief (App. Br. p. 46) and ACLU in their brief amicus (ACLU Br. p. 30) have already had occasion to point up the fact that the procedures here employed by the Commission almost bordered on entrapment, particularly with the term "coarse and vulgar," as used in the Commission letter, nowhere defined and with no two people necessarily agreeing on what statements do or don't come within such terminology. Unlike in WOKO, we do not here have claimed misrepresentation relating to objective facts -- with the licensee there

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[1] As heretofore shown the Commission did not subsequently choose to rely on any oral statements by Robinson prior to the date of the hearing order (App. Br. p. 36).

repeatedly representing in sworn reports that the stock ownership was such and such, whereas (as the evidence incontestably showed) it was something else. Here we have subjective facts — were some programs broadcast by Walker "coarse and vulgar" (whatever that term means) and was Robinson aware that Walker's broadcasts were "coarse and vulgar"?

Robinson, as we have heretofore admitted (App. Br. 39), was familiar with various punning or assonant epithets which Walker applied to nearby towns (e.g., his references to Greelyville as Greasy Thrill, Bloomville as Bloomersville, St. Stephens as St. Step-ins, Monk's Corner as Monkey's Corner, Georgetown as Stinkumville). Those epithets, as the record shows, were not of Walker's coinage and were in common use in the Kingstree area (Tr. 313-314, 541-542). Though Robinson was aware that those appellations might offend sponsors or residents of Monkville or of Georgetown, who might not like their communities referred to as Monkey's Corner or Stinkumville,[1] and on numerous occasions remonstrated to Walker on that score,[2] it is quite evident that Robinson did not regard these references to various towns as "coarse or vulgar" (Tr. 209-212, 215, 233, 225, 233, 311-313, 326).[3] Although trial counsel for the Commission, and the Commission itself, persisted in contending that these assonant epithets, in common use in the area, were in fact "coarse and vulgar," and continued to

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[1] Georgetown was so called because of sulphurous fumes emanating from paper mills located there (Tr. 313).

[2] Commission counsel persist (FCC Br. p. 25) in construing Robinson's remonstrances as an admission that he was thus aware of the "coarse and vulgar" nature of Walker's programs, whereas it is clear from the record that the remonstrances arose from the fact that residents and property owners in these towns might be offended for altogether different reasons.

[3] With all deference to Commission counsel we do not read the record as showing that Robinson at first denied and then later admitted (FCC Br. p. 11). After an overnight recess Robinson recalled and placed on the record additional epithets and Walkerisms (Tr. 215, 223-224, 225, 233, 314, 315).

catalog them as such in FCC Exhibit 2, Commission counsel have all but conceded here that they cannot be so regarded (see FCC Br. p. 28, 36).

Thus, for the purpose of proving misrepresentation, affirmative answers by Commission witnesses to such questions as "Did you hear any material on the Walker program of a coarse, vulgar, suggestive or indecent nature" (Tr. 508), with those words undefined, prove nothing. When shown FCC Ex. 2, those witnesses at most recalled only "portions" thereof (e.g. Tr. 521), and when pinned down the portions they recalled were in large part the assonant epithets (Tr. 521-522, 549, 579), which Commission counsel now concedes are not to be so classified (FCC Br. pp. 28, 36).

From our analysis of the record, as set out in our opening brief (App. Br. pp. 39-48), and which we will not here repeat, we deem the evidence on which the Commission relies as proving misrepresentation to be far from persuasive, if analyzed in the light of the fact that Robinson did not deem the assonant epithets Walker employed in identifying certain near-by towns, epithets in common usage in the area, to be "coarse and vulgar." Commission counsel, on the other hand, contend that misrepresentation was proved (FCC Br. 24-32). The record, of course, speaks for itself on this matter, and after examining it this Court will no doubt have its own opinion on what it shows or does not show on this matter — an analysis which, of course, would be wholly unnecessary if this Court places on the June 10 letter the same construction that we do.

One thought we leave with the Court on this score: We think it would be shocking to impose the "death penalty" on the basis of evidence as conflicting and as confusing as we deem it to be here. Although the Commission has stated in an "institutional decision" that either Issue 1 or 3 standing by itself warranted a death sentence, we quite agree with ACLU's observation (ACLU Br. p. 29), with the evidence on

the misrepresentation issue far from conclusive, that the Commission should be required to take a second look at this matter, in the event this Court holds (as we think recent Supreme Court decisions require) that the Commission improperly delved into program content under a broad "public interest" standard in connection with Issues 2, 3, and 4.

CONCLUSION

For reasons stated in our opening brief and reemphasized here, we submit that the Commission's refusal to renew WDKD's license, predicated as it was on an examination into program content (in connection with Issues 2, 3, and 4 and to a lesser degree in connection with Issue 1) under a broad public interest standard, contravened the First Amendment and the no-censorship provisions of 47 U.S.C. Sec. 326, and that the Commission's conclusions regarding Issue 1 were in various other respects illegal, arbitrary and capricious, and contrary to the public interest. Accordingly, the decision below should be reversed and the matter remanded to the Commission for further proceedings in accordance with law.

Respectfully submitted,

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COMPANY (WDKD)

September 16, 1963

PETITION FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,587

E. G. ROBINSON, JR., tr/as
PALMETTO BROADCASTING COMPANY (WDKD),

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from a Decision and Order of the
Federal Communications Commission

April 3, 1964

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PETITION FOR REHEARING

Appellant E. G. Robinson, Jr. tr/as Palmetto Broadcasting Company (WDKD), by his attorneys, requests rehearing by the panel which heard this case of the opinion released March 19, 1964, and alternatively for a hearing en banc.

In an effort to be of assistance to the Judges who have not heard this appeal, we first outline briefly the pertinent facts. We then set forth our reasons why a decision on the First Amendment, no-censorship, and delegation issue cannot and should not be "ducked".

I. BACKGROUND STATEMENT

Appellant, E. G. Robinson, Jr., is the licensee of Station WDKD, a daytime-only station and the only broadcast facility licensed to Kingstree, S. C. In addition to serving Kingstree, a town of 3800 people, WDKD serves a number of other small towns in Williamsburg and adjoining counties in South Carolina, an area which is largely agricultural, with a population which is predominantly Negro (WDKD Ex. 2, J. A. 5; R. 205-210, 896; Tr. 358-359).

From the time WDKD went on the air in 1949 until matters giving rise to the present litigation occurred in 1960, except for a couple of years in the armed services during the Korean conflict, one Charlie Walker was a disc jockey on Station WDKD (Tr. 136, 223-224; J. A. 332, 393). He had three shows each week-day — a two-hour show at sign-on, an hour show around noon, and an hour show shortly before sign-off, consisting of musical recordings interspersed with patter and commercial announcements (Tr. 136-137; J. A. 332).

In the '40's and throughout the '50's, WDKD's license was regularly renewed — apparently no complaints to the Commission, no questions, no problems.

However, in April of 1960, with WDKD's then current license due to expire December 1, 1960, a competing broadcast station (WJOT) in Lake City, S. C., six miles away, hand-delivered to the Commission in Washington six tapes which purported to be off-the-air recordings of certain shows, or portions thereof exclusive of music, broadcast over WDKD by Charlie Walker (cf. R. 888-889, Fdg. 36, J. A. 232).

On May 11, 1960, the Commission wrote Robinson, and (without divulging the dates, source, or precise contents) stated that it had in its possession tape recordings of several of Walker's broadcasts, and that some of the material on Walker's shows was "vulgar and suggestive" (WDKD Ex. 3, J. A. 9). After stating that it was the Commission's practice to associate complaints with the files of the station involved and to

afford the licensee "an opportunity to submit a statement with respect thereto", for which reason "this matter is being brought to your attention", Robinson was requested to submit a statement "with respect to this matter" (WDKD Ex. 3, J.A. 9).

Upon receipt of this letter appellant immediately talked to Walker, who denied knowledge of having broadcast any "vulgar or suggestive" material over WDKD (R. 212, J.A. 11; Tr. 142, J.A. 336). Appellant then telephoned his Washington attorneys, Daly and Ehrig. Mrs. Ehrig asked to hear the tapes and to be apprised of their dates and source. The Commission's Broadcast Bureau refused (R. 212, J.A. 10). Following a formal demand for permission to hear the tapes so that WDKD could reply to the May 11 letter (WDKD Ex. 4, J.A. 10-11), the Bureau some three weeks later (on June 8, 1960) allowed Mrs. Ehrig to listen to excerpts from some of the tapes and to make notes thereon, whereupon she advised Mr. Robinson that certain items which she had heard (eight in number which she there quoted) were improper, that Walker should be discharged, and that steps should be taken to prevent any recurrences (WDKD Ex. 5, J.A. 11-12).

Two days thereafter (June 10, 1960), in a letter prepared with the assistance of his local attorney (Tr. 148, 157, J.A. 340, 347), Robinson advised the Commission that he had received from his Washington counsel "several quotations from the taped shows" (eight items), that "these statements made by my employee, Charlie Walker, were not known to me", that until receiving the June 8 letter he was not acquainted "with the nature of the statements made by Charlie Walker", that immediately upon learning of "these statements" that he had discharged Walker, and that procedures had been established to avoid any recurrences (WDKD Ex. 6, J.A. 13; cf. WDKD Ex. 7, J.A. 14).

Having thus effected compliance upon being forewarned for the first time, the Commission did not attempt to institute revocation proceedings, where it would have had the burden of proof and the burden of proceeding (47 U.S.C. sec. 312(d); see 5 U.S.C. Sec. 1008(b); Attorney General's

Manual on the Administrative Procedure Act (1947), pp. 90-91; cf. 47 U.S.C. Sec. 312(a)(5); see App. Reply Br., p. 7, fn. 2). The Commission accordingly waited until Robinson filed for renewal, whereupon (on March 21, 1961) it designated WDKD's renewal for hearing on four factual issues (J.A. 215): (1) Whether the licensee had misrepresented certain facts to the Commission; (2) whether he had maintained adequate control over his station; (3) whether any program material on Walker's shows was "coarse, vulgar, suggestive, and susceptible of indecent double meaning"; and (4) whether WDKD's programming in general has met the needs of the area and the population it serves.

The hearing was held in Kingstree in late May-early June of 1961 before Examiner Donahue — with 18 witnesses called by the licensee, and 10 by the Bureau. Nine resolutions, signed by some 65 civic, governmental, religious, and other leaders of Kingstree and neighboring communities, urging renewal of WDKD's license, were duly received in evidence (WDKD Exs. 12-20, R. 377-385, J.A. 187-197).

In an Initial Decision released in December 1961 (33 FCC 265, J.A. 214-287), the Examiner held that "the pivotal issue in this case is issue three" (J.A. 264). He then proceeded to equate "obscenity", as used in 18 U.S.C. Sec. 1464, with "coarse and vulgar", as used by the Commission in Issue 3, and concluded that some of Walker's broadcasts were "obscene and indecent" on their face, and a fortiori "coarse and vulgar". Despite findings generally adverse to Robinson, the Examiner was nevertheless of the opinion that the question of what to do with WDKD's renewal was a "close one" (J.A. 284). (1) Because Robinson had not been forewarned (see 5 U.S.C. Sec. 1008(b); 47 U.S.C. Sec. 312); (2) because Robinson was a respected leader in his community; (3) because Robinson would not again (the Examiner felt sure) allow objectionable material to be broadcast over WDKD; and (4) because Robinson had marshalled "a formidable expression of community support for the retention of his license" (R. 921-924, Concls. 18-23, J.A. 279-284).

However, since the Examiner (unlike the Commission) was precluded for procedural reasons from imposing any in-between penalty, since a token penalty would not suffice, and since this case must stand as a warning to others under the Commission's new "get-tough" program policies, the Examiner felt that these considerations overrode those running in favor of a renewal (R. 927, Concl. 27, J.A. 287).

On exceptions and review the Commission took a quite different view of the case -- at least in its key aspects (33 FCC 250, R. 1416; J.A. 288-302). The Commission denied that Issue 3 was "pivotal" (R. 1420, para. 13, J.A. 293), and concluded that Issue 1 was "just as important", and standing alone required a denial (R. 1420, 1426, paras. 13, 25, J.A. 293, 301). Then, after denying that its Issue 3 should be equated with obscenity and that something less than obscenity was here sufficient, the Commission concluded that "by any standard" the Walker broadcasts were "obviously offensive and patently vulgar", "and thus contrary to the public interest" — and that a refusal to renew WDKD's license on that ground impinged on neither the First Amendment nor the "no-censorship" prohibitions of the Communications Act (47 U.S.C. Sec. 326) (R. 1423-1424, Concls. 22-23, J.A. 298-300). Although of the view that a short-term renewal might be more appropriate with respect to the deficiencies found in connection with Issues 2 and 4, nevertheless when coupled with the conclusions which it had reached under Issues 1 and 3, the Commission deemed the "death penalty" was required here (R. 1421, 1425-1426, paras. 16, 24, J.A. 295, 300).

On appeal to this Court appellant contended, under recent Supreme Court decisions, (1) that any delving by the Commission into "program content" in areas (as here) where that agency can point to no standard more specific or substantive than "public interest, convenience, and necessity", violates the free speech guarantees of the First Amendment and the "no-censorship" prohibitions of 47 U.S.C. Sec. 326 (App. Br. pp. 13-26, App. Reply Br. pp. 1-16); and (2) that the Commission in this case had clearly delved into program content in connection with

Issues 2, 3, and 4, and to a lesser degree in connection with Issue 1, and had read broader denials into Robinson's letter of June 10, 1960 than were warranted by the language there used (App. Br. pp. 26-48; App. Reply Br. pp. 16-22).

Apparently troubled by the recent Supreme Court pronouncements on which appellant relied, Chief Judge Bazelon and Judge Washington elected to sustain the Commission's refusal to renew WDKD's license solely on the ground that Robinson had misrepresented facts to the Commission (Issue 1). They accordingly reached "no other questions" and intimated "no views on whether the Commission could have denied the applications if Robinson had been truthful" (slip op. p. 4). Judge Miller, though agreeing with the per curiam opinion as far as it went (slip op. pp. 5-7), was of the view, despite later Supreme Court pronouncements, that KFKB Broadcasting Ass'n. v. Federal Radio Commission, 60 App. D.C. 79, 47 F.2d 670 (1931) was still good law, and would have sustained the denial under Issues 2, 3 and 4 as well.

II. THE RESTRICTED CHARACTER OF THE MISREPRESENTATION ISSUE (Issue 1)

Try though we did in our previously filed briefs, it would appear, with the matter nowhere discussed in the March 19 Opinions of this Court, that we have not succeeded in getting across to the Court our basic contention regarding the misrepresentation issue, namely, that the claim of misrepresentation must stand or fall on the contents of a single written document (Robinson's letter of June 10, 1960 responding to the Commission's May 11 inquiry), and that the charge of misrepresentation arises from the Commission's reading into that letter assertions not warranted or required by the language there used and not intended by Robinson (App. Br. pp. 35-39; App. Reply Br. pp. 17-19).

A. The Claim of Misrepresentation Stands or Falls on the June 10 Letter. -- Congress has expressly provided that where a hearing is ordered on a given application the Commission shall specify "with

particularity the matters or things in issue but not including issues or requirements phrased generally" (47 U.S.C. Sec. 309(e)). In line with this requirement the hearing order of March 21, 1961, contained the following explicit recitals (R. 106-107; Tr. 112-113; App. Br. pp. 5-6):

> The Commission having under consideration (1) the above-captioned applications; (2) the Commission's letter of May 11, 1960 to said licensee; (3) the replies and affidavits dated June 10, 13 and 22, 1960 filed by said licensee; and (4) the Commission's field inquiry with respect to the operations of Station WDKD; and
>
> IT APPEARING, That in the Commission's letter of May 11, 1960, it was brought to said licensee's attention that the Commission had information, including tape recordings, concerning certain program material broadcast by said station, with particular reference to the Charlie Walker programs, and that said broadcast material was allegedly vulgar, suggestive and susceptible of double meanings with possible indecent connotations; and
>
> IT FURTHER APPEARING, That in the licensee's replies and affidavits, said licensee disclaimed knowledge of the nature of the statements broadcast by said Charlie Walker over said radio station and stated further that immediately upon learning of the nature of the statements, said licensee discharged said Charlie Walker; and
>
> IT FURTHER APPEARING, That written and oral statements submitted to the Commission by the licensee with respect to the above matters contained misrepresentations and/or were lacking in candor; . . .

On the basis of these four recitals the Commission included Issue 1, phrased as follows (see J.A. 215):

> (1) To determine whether in the written or oral statements to the Commission with respect to the above matters, the licensee misrepresented facts to the Commission and/or was lacking in candor.

It is thus apparent that the so-called "misrepresentation issue" (Issue 1), which the Commission and the Court have equated with WOKO, was a restricted one, namely, whether Robinson in certain written and and oral statements to the Commission, before the hearing was ordered,

had misrepresented various facts. Precisely what "written and oral statements" did Robinson make to the Commission prior to March 21, 1961, which the Commission has since concluded were "misrepresentations"?

So far as the present record shows, the only "oral statements" which Robinson ever made to the Commission or to its staff prior to March 21, 1961, were those made to a field investigator in August of 1960 (Tr. 124-125, 329). That investigator was never called as a witness, and the Commission at no time attempted to show that Robinson made any false statements during that interview. Accordingly, the Commission's contention that Robinson misrepresented certain matters to the Commission narrows itself down to his "written statements".

Robinson's written statements to the Commission, as listed in the hearing order (R. 106-107) and again in a demand by Robinson's attorney for a bill of particulars (R. 108K-108N, R. 174, para. 7), are four in number — his letter of June 10, 1960 (WDKD Ex. 6, J.A. 13); a related affidavit of the same date (WDKD Ex. 7, J.A. 14); and two subsequent affidavits of June 13 and June 22, 1960 (WDKD Exs. 8 and 9, J.A. 15-17).[1]

In connection with the misrepresentation issue, neither the Commission below, its counsel here, or the per curiam affirmance rely upon any statements in Robinson's affidavits of June 10, 13, and 22

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[1] Although the Commission in its decision (R. 1418, para. 9; J.A. 291) and Commission counsel in their subsequent briefs in this Court (see FCC Br. p. 28, fn. 15), in connection with the misrepresentation issue, sought to attach great importance to certain statements in a letter of May 20, 1960 by Robinson's then attorney to the Commission requesting permission to listen to the tapes (WDKD Ex. 4, J.A. 10-11), appellant has heretofore pointed out in his briefs that this letter was not listed in the hearing order nor in the subsequent bill of particulars (see 47 U.S.C. Sec. 309(e)). Since this Court's per curiam decision of March 19 sustaining the Commission's conclusions on Issue 1 makes no mention of the May 20 letter, there is reason to assume that the Court has agreed with our contention that the May 20 letter has no bearing on the misrepresentation issue.

(WDKD Exs. 7-9, J.A. 14-17). Hence, the issue whether Robinson made any false statements to the Commission prior to March 21, 1961, is thus narrowed to those contained within the four corners of a single written instrument — Robinson's letter of June 10 (WDKD Ex. 6, J.A. 13) submitted in response to the Commission's inquiry of May 11, 1960 (WDKD Ex. 3, J.A. 9; Tr. 147-150, J.A. 340-342).

B. The Restricted Wording of the June 10 Letter. — Precisely what representations did Robinson make in his June 10 response to the May 11 inquiry, and which if any of those representations were subsequently shown to be false?

Preliminarily, since we are here confronted with a written document prepared by a layman with the assistance of his local attorney (Tr. 148, 157, J.A. 340, 347), administrative "expertise" is not involved. This Court is certainly as competent as the Commission to determine the proper construction of the June 10 letter. It is to be further noted that the June 10 letter was in reply to the May 11 inquiry (Tr. 147, 150, J.A. 340, 342), an inquiry which was far from specific, and that the June 10 letter was drafted by Robinson and his local attorney immediately upon receipt of the June 8 letter from Washington counsel listing eight quotations which she had heard from Walker's taped broadcasts and which she deemed objectionable (WDKD Ex. 5, J.A. 11-12).

Turning now to the June 10 letter itself (WDKD Ex. 6, J.A. 13), the Commission has not challenged the accuracy of the first and last paragraphs of that letter. The second paragraph was worded as follows (J.A. 13):

> I have just learned through the medium of a letter written to me by my Attorneys in Washington, Daly & Ehrig, who have advised me in partial detail of certain taped shows of an employee of mine by the name of Charles Walker. In this letter, several quotations from the taped shows are set out in detail. These statements made by my employee, Charlie Walker, were not known to me, and I cannot help but agree that

> they are suggestive and in some cases, of a vulgar nature. As a result of this information and in line with my avowed policy of maintaining a clean and decent Radio Station, I have unconditionally released Charlie Walker from my employ as of the date of this letter.

It is obvious that this paragraph of Robinson's letter of June 10 refers to the eight quotations from Walker's taped shows which Mrs. Ehrig set forth in her letter of June 8 (WDKD Ex. 5, J.A. 11-12). "These statements [i.e., the eight quotations from that letter]", so Robinson stated, were not known to him until he received Mrs. Ehrig's letter. Nowhere in the Commission's subsequent decision or in Commission counsel's briefs in this Court has it been asserted or contended that the evidence submitted at the subsequent hearing in any way proved that Robinson had prior knowledge of those particular quotations and stories. Nor is it suggested that Walker was not in fact discharged on June 10, 1960 or that he has since returned to the station. Thus, the allegations by Robinson in the second paragraph of his June 10 letter were not "deliberate misstatements".

Looking at the third paragraph of the June 10 letter (J.A. 13), though the first sentence asserted a lack of familiarity "with the nature of the statements" made by Charlie Walker, it is apparent from the immediately preceding paragraph and from the second ensuing sentence (stating that "upon learning of the nature of these statements" Walker was released) that Robinson was again referring to the eight statements which his Washington counsel had supplied him after listening to the tapes. That Robinson (and his local attorney) interchangeably used "the statements" and "these statements" to refer to the eight statements contained in Mrs. Ehrig's letter of June 8 is further borne out by Robinson's concurrently prepared affidavit of the same date (June 10) where he stated "that certain programs of an employee of his by the name of Charlie Walker have been taped, that deponent has been furnished with certain quotations from a number of programs of which the said Charlie Walker was in charge; that the statements as shown by the

taped programs have a tendency toward suggestions of an uncouth nature and, in some instances, could be construed as being vulgar . . ." (WDKD Ex. 7, J.A. 14).

And finally, what is even more significant, when thrice queried at the subsequent hearing on the intended scope of the denial contained in the June 10 letter (WDKD Ex. 6), Robinson testified that the June 8 letter setting forth the eight quotations was the basis for the statements contained in his letter of June 10 (Tr. 146, J.A. 339; Tr. 150, J.A. 342); that the June 8 letter provided him with his first information concerning those "particular items" (Tr. 153, J.A. 343-344; cf. Tr. 150, J.A. 342; Tr. 151, J.A. 343); that his letter and affidavits to the Commission addressed themselves to the "particular statements" contained in Mrs. Ehrig's letter of June 8 and "not to the overall nature of Charlie Walker's program" (Tr. 154, J.A. 344; Tr. 214-215, J.A. 387-388).

In short, it seems too clear to admit of argument, that the assertions in the June 10 letter about lack of prior knowledge were restricted, and such was Robinson's intent, to the eight items which Mrs. Ehrig, after listening to the tapes of Walker's broadcasts, had set forth in her letter of June 8. Bearing in mind that the June 10 letter was drafted by an attorney, certainly a literal, permissible, and altogether natural construction of the June 10 letter would be that it pertained to the eight items from the tapes furnished Robinson by his Washington attorney. And we repeat that neither the Commission below nor its counsel here makes any claim that the subsequently adduced evidence even remotely proved that Robinson had any previous knowledge of those particular items.

Thus, Robinson is being crucified for alleged misstatements of fact solely because the Commission has read his June 10 letter as a general denial rather than a specific denial of knowledge — restricted to the eight excerpted items contained in Mrs. Ehrig's letter of June 8. It is only by placing on the June 10 letter a broader interpretation than

the language there used, or alternatively by asserting that the letter was so incomplete a response as to be lacking in candor, that even the ghost of a misrepresentation problem can arise under Issue 1.

Certainly it cannot be contended that Robinson by his June 10 letter did not submit a "statement " concerning the Walker tapes which he had been afforded an "opportunity" to do and which the Commission requested he do in their May 11 letter (WDKD Ex. 3, J.A. 9). Robinson's failure to volunteer more (bearing in mind that the Commission already had numerous tapes of Walker's broadcast and that the Commission had so advised Robinson) cannot properly be characterized as lack of candor. And in this connection, it is to be remembered that Robinson concluded his letter of June 10 by advising the Commission that "if there is any further statement or information you would care to have from me, I will be glad to cooperate in any way possible" (J.A. 13). Thus, though facing a possible criminal prosecution under 18 U.S.C. Sec. 1464, Robinson did not seek shelter behind the guarantees of the Fifth Amendment against "self incrimination". Considering the dire consequences which here flow from a finding of falsification, if a written instrument has two possible constructions, the victim should be accorded the benefit of the doubt.

C. Even with the June 10 Letter More Broadly Construed, Proof of Misrepresentation was Questionable. — Even if this Court were to place a broader construction on Robinson's letter of June 10 than its natural tenor and other matters here mentioned would seem to warrant or require, it is far from clear that "misrepresentation" was subsequently proved.

At the hearing Robinson candidly admitted that he was familiar with various punning or assonant epithets which Walker applied to nearby towns (e.g., Walker's reference to Greeleyville and Greasy Thrill, Bloomville as Bloomersville, St. Stephens as St. Step-ins, Monk's Corner as Monkey's Corner, Georgetown as Stinkumville). Those epithets, as the record shows, were not of Walker's coinage and were in

common use in the Kingstree area (Tr. 313-314, 541-542). Though Robinson was aware that these appellations might offend sponsors or residents of Monk's Corner or Georgetown and on numerous occasions remonstrated to Walker on that score, it is quite evident that Robinson did not consider these references to various towns as "coarse or vulgar" (Tr. 138, 209-212, 215, 223, 225, 233, 311-313, 326). Trial counsel for the Commission and the Commission itself were of a totally different view. They persisted in contending that these assonant epithets, though in common use in this "Tobacco Road" area of South Carolina, were in fact "coarse and vulgar" and continued to catalog them as such in FCC Ex. 2 (J.A. 197-206). Thus, though the Commission's general counsel in his brief in this Court all but conceded that these appellations cannot be so regarded (FCC Br. pp. 28, 36), and though these epithets which Robinson admitted he was familiar with were considered "insignificant exceptions" by this Court (slip op. p. 3), the Commission itself viewed these admissions quite differently — as proof positive that Robinson's June 10 denials were false.

Though Robinson stated at the hearing that he had never heard complaints about the material broadcast by Walker, other than the assonant epithets and related "insignificant" items, the per curiam statements that "numerous other witnesses . . . testified they had made such complaints to Robinson" (slip op. p. 3) and that "many witnesses" contradicted Robinson on this score (slip op. p. 4), are, we submit, an oversimplification of the record.

The Commission's first witness, a former station employee (Ward), admitted that he had never passed on to Robinson any complaints he heard about the contents of Walker's programs (Tr. 527). Roper, the engineer who made the tape recordings, nowhere intimated that he brought the Walker matter to Robinson's attention (Tr. 595-637). Another former employee (Green), though aware of complaints about "hillbilly" music played on Walker's program, mentioned only one other complaint (Tr. 642),

but nowhere stated that he brought that complaint to Robinson's attention. Youngblood and Osborne, though stating that Walker's programs were informally discussed by the South Carolina Broadcasters, admitted that no action was taken on the matter (Tr. 664), and that no complaint was forwarded to Robinson (Tr. 756). Godwin, a former employee, though equivocating at a point or two (Tr. 684, 685), when pinned down, admitted that the complaints he had heard were relayed on to Mrs. Robinson, not to Mr. Robinson (Tr. 683, 702, 708), Creamer. of Sears & Roebuck, who objected to Walker's ad libbing departures from the prepared advertising scripts and to the content of Walker's programs (Tr. 740-742, 743), knew he had talked to a WDKD salesman (Tr. 742) but was uncertain whether he had mentioned this particular matter to Robinson (Tr. 743, 745, 746).

Thus, at most, only 3 out of the 10 witnesses called by the Commission stated that they ever discussed the content of Walker's programs with Robinson, namely, Drennan, Lawton, and Few. Reverend Dennan, who recalled from FCC Ex. 2 only the assonant epithets (Tr. 549-550), testified that he discussed Walker's shows with Robinson while the latter was in the hospital recuperating from a serious automobile accident (Tr. 556), and complained at another time of the type of music played by Walker following a broadcast of a morning devotional (Tr. 561). He admitted that no complaint was made by the Ministerial Association (Tr. 562). Reverend Lawton testified that, when Robinson's daughter, a victim of multiple schlerosis, was at death's door (Tr. 591), he complained to Robinson of Walker's programs (Tr. 581) and "implied" that they should be cleaned up (Tr. 582). That Dennan's complaint, while Robinson was in the hospital and under sedation (Tr. 343), after his serious automobile accident which left him incapacitated for the better part of a year (WDKD Ex. 1, R. 204; Tr. 122, 350), might not have registered completely with him is not surprising, since various ministers (as Robinson had testified and Drennan admitted) had complained about the type of music (rock and roll) played by Walker immediately following a morning devotional (see Tr. 156, 158-159, 226-227, 561). And that Robinson, when his only daughter was critically ill (Tr. 591) may have

thought that Lawton was complaining about Walker's broadcasts, because of the type of music played rather than their content, would be equally understandable (Tr. 581-582).

That full credence should be given Few's testimony is indeed a mystery. Few, who was largely a silent partner in WDKD until 8 months before he sold out to Robinson in 1956 (Tr. 333-336), was obviously a hostile witness. Although Few testified that he discussed Walker's programming with Robinson, another government witness and a former employee (Osborne) recalled Few making such comments to Mrs. Robinson, but not to Mr. Robinson (Tr. 702). That Few's assertions on this score are further suspect is borne out by the fact that his sworn reasons in 1956 for selling his half interest to Robinson, so as to devote his time to another enterprise, scarcely jibe with his sworn 1961 testimony in this proceeding.

The Walker "firing" by Few in 1956, on which Judge Miller places special emphasis (slip op. p. 5), was explained by Robinson as follows: Osborne (but not Robinson) was at the station when Few told Walker to "get out" (Tr. 702-703). The following morning (July or August of 1956),[1] in stopping at the station on his way to his farm, Robinson was told by Walker that he (Walker) had had "some differences" with Mr. Few the previous day (Tr. 775). Robinson thereupon told Walker that, with Few a 50% partner, he had better get his differences or misunderstanding with Few straightened out (Tr. 775). Robinson heard nothing further about the matter (Tr. 775, 776-777). Few admitted that he didn't press the matter (Tr. 726) and never mentioned it to Robinson (Tr. 726).

D. Summary. — In order to sustain an adverse conclusion under Issue 1 (in view of the recitals in the hearing order, the subsequent bill of particulars, the requirements of 47 U.S.C. Sec. 309(e), and the evidence subsequently adduced), any misstatements by Robinson to the Commission must be found within the four corners of a single written document

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[1] Osborne's October 1956 date was obviously in error, because by that time Few had already sold his 50% interest to Robinson (see Tr. 337).

— Robinson's letter of June 10, 1960 (WDKD Ex. 6, J.A. 13). That letter, if construed according to its logical tenor and in line with what Robinson there intended, was restricted to a discussion of the eight excerpted quotations from the tapes of Walker's broadcasts which Robinson's Washington attorney forwarded to him on June 8, 1960. Since the Commission at no time has contended that Robinson was previously aware of those particular statements by Walker, Issue 1 (misrepresentation) is thus entirely eliminated from this case.

Even if a broader interpretation be placed on the June 10 letter than Robinson intended, the subsequently adduced evidence is not necessarily inconsistent therewith. Whether subjective knowledge was in fact proved is at least questionable.

III. REASONS FOR GRANTING REHEARING

1. If we be right that the June 10 letter dealt only with the eight excerpted statements which Robinson's Washington attorney had furnished him on June 8, certainly a permissible construction and the one Robinson intended, the misrepresentation issue (Issue 1) is entirely eliminated from this proceeding, and the per curiam opinion of March 19 ignoring this basic fact cannot stand.

2. Even if the June 10 letter be more broadly construed, in a manner contrary to that intended by Robinson, the per curiam affirmance on the basis of Issue 1 alone, unless a majority of the Court is also prepared to affirm under Issue 3,[1] should not stand — for a very simple reason: The Commission's finding of misrepresentation was predicated in part on the June 10 letter (WDKD Ex. 6, J.A. 13), in part on the May 20, 1960 letter of Robinson's attorney (WDKD Ex. 4, J.A. 10-11), and in part on "assonant epithets" and other "Walkerisms" which Robinson admitted he had heard and which the Commission concluded were "coarse

[1] We put Issues 2 and 4 to one side for two reasons; first, because they raise the same First Amendment, no-censorship and delegation problems as are presented by Issue 3; and second, because the Commission itself has admitted that "punishment" in the form of a short-term renewal rather than a death penalty would be more meet under those issues.

and vulgar". With this Court apparently recognizing that the May 20 letter is not here relevant, in line with appellant's arguments on that score, and with this Court, as did Commission counsel in this Court, deeming the assonant epithets and Walkerisms to be "insignificant" (slip op. p. 3), the Commission should be afforded an opportunity to review its findings and conclusions on the misrepresentation matter solely in the light of those supposedly contained in the June 10 letter.

3. A failure of the Court to consider the First Amendment, no-censorship and delegation problems inherent in Issues 2, 3, and 4 will in this case work a grave injustice. The highly competent Examiner in this case,[1] after hearing all the evidence, was of the view that Issue 3 was the "pivotal issue" in this case, and that a decision on what to do with WDKD's renewal a "close one". Although the Commission, in order to shore up its first foray into "program content" in a renewal proceeding since 1932, repudiated the views of its Examiner by stating in an "institutional" decision that either Issue 1 or Issue 3, standing by itself, rendered a death penalty mandatory, the Commission should be afforded an opportunity to take another look at this matter — if the Commission (in discussing Issue 1) considered elements or matters which should not have been considered (see paragraphs 1 and 2 supra), or if the Commission improperly delved into program content. Most certainly the Commission should be afforded another opportunity to consider its "drastic administrative action" under Issue 1 if this Court be of the view, as recent Supreme Court pronouncements seem to indicate, that the Commission exceeded its statutory authority under Issues 2, 3, and 4, a matter which the per curiam opinion expressly avoids.

4. Bearing in mind that this Court, in two very early decisions sustained the Commission's authority to delve into "objectionable programming" at renewal time under a standard no more specific and substantive than the "public interest", rulings which we contend are contrary to more recent Supreme Court pronouncements, the length to which the

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[1] See McClatchy Broadcasting Co. v. Federal Communications Commission, 99 U.S. App. D.C. 195, 239 F. 2d 15 (1956).

per curiam opinion goes in predicating its affirmance solely on Issue 1 and in thus avoiding the First Amendment, no-censorship, and delegation problems involved in Issue 3 (slip op. p. 4) would seem to suggest, as appellant argued, that the Commission's powers in this field are by no means clear. The extent of the Commission's authority to delve into program content, in the absence of more specific congressional legislation, is a matter of no small concern to some 5500 broadcast licensees (AM, FM and TV).

5. The well-established doctrine that courts should not "anticipate" constitutional questions, where cases can be decided on other grounds, is not here applicable. We are not asking this Court to undertake the delicate task of invalidating legislation by a co-equal arm of the government (Congress). We are here contending that the grant to the Commission by Congress of authority to grant and deny licenses in the "public interest" must be read in pari materia with the no-censorship prohibitions of the same statute (47 U.S.C. Sec. 326). It is our position that Congress did not delegate to the Commission and did not purport to delegate to that agency the authority to delve into program content, under a standard no more specific and no more substantive[1] than "public interest, convenience, and necessity" — in the face of the no-censorship prohibitions of 47 U.S.C. Sec. 326 and the free speech guarantees of the First Amendment, and in the face of Supreme Court doctrines that where evils which the government can regulate are intertwined with First Amendment freedoms, Congress must first legislate with "narrow specificity".[2] In short, we are not here challenging the constitutionality of the Federal Communications Act, nor are we denying that Congress has some residium of power to legislate "with specificity" in this field. The issue here is not one of constitutionality, but one whether the Commission exceeded the bounds of the statute under which it functions when it classified material as

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[1] See Head v. New Mexico, 31 Law Week 4643, 4644-4645 (U.S. Sup. Ct. 1963).

[2] NAACP v. Button, 31 Law Week 4063, 4067 (U.S. Sup. Ct. 1963); Smith v. California, 361 U.S. 147, 150-151 (1959); United States v. International Union, 352 U.S. 567, 598 (1957) (Douglas J dissenting); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

"objectionable" under a standard which is no more specific and no more substantive than the "public interest" — with Congress itself having expressly foreclosed censorship or interference with free speech by the Commission, either on a case-by-case basis or by general regulation (47 U.S.C. Sec. 326).

6. In here electing not to consider basic First Amendment, no-censorship, and delegation problems presented by Issues 2, 3, and 4, this Court is thus lending encouragement to the Commission's recent forays into program content, its "lifted eyebrow" techniques, and its other indirect intrusions into this area. Without any assistance from this Court the Commission is all too prone to avoid direct challenges to its statutory authority. A recent Note in the Harvard Law Review, Feb. 1964, entitled "Regulation of Program Content by the FCC", contains the following significant observations on this point (p. 712):

> In Palmetto Broadcasting Co., the FCC opened up a new and potentially far-reaching area of concern for specific program content. In that case, the Commission refused to renew the license of a station which broadcast material that, while not obscene, was "offensive or patently vulgar". Although, as is typical, other grounds existed for the Commission's action in Palmetto, the nub of the case appears to be the program content; the allegedly offensive jokes were carefully analyzed by both the FCC examiner and the Commission. This new venture into the realm of qualitative content regulation presents a strong test of the constitutional, statutory, and administrative limitations on FCC authority in the content area. The court of appeals, in reviewing Palmetto, may uphold the Commission's action on some of the alternative grounds of decision. In this event, the limits on FCC authority will remain unclear, and its action in Palmetto may prove a successful feint of regulation, whereby the FCC can affect program content even when it may not actually have authority to do so . . . [footnotes omitted].

Thus, for this Court to "duck" the real "nub" of this case may all be very well, if the Commission has the powers ascribed to it by Judge Miller. However, if there be merit in appellant's contentions that the Commission is here exercising authority which Congress did not delegate

(in view of 47 U.S.C. Sec. 326) and could not delegate except with "narrow specificity" (in view of the First Amendment and recent Supreme Court pronouncements requiring "specific standards" where regulatory activities impinges on First Amendment freedoms), the Court by its silence is indirectly sanctioning "lawless" action.

7. On this point it is to be further borne in mind, with Congress having vested in this Circuit and this Circuit only (47 U.S.C. Sec. 402(b)) the review of all Commission decisions revoking or refusing to renew broadcast licenses, the First Amendment, no-censorship, and delegation problems involved in Issues 2, 3, and 4 cannot arise, at least directly, in other Circuits. Thus, the primary responsiblity of keeping the Commission within the confines of its delegated authority falls to this Court. The March 19 opinions of this Court leave the problem needlessly unsettled: It is well known that two early decisions by this Court, decided before Chief Justice Hughes' landmark decision in Near v. Minnesota, sustained the Federal Radio Commission's authority to delve into "program content" at renewal time. It is generally known in the broadcast industry that the correctness of those decisions was being challenged in this case, in the light of more recent Supreme Court pronouncements. With the March 19 per curiam decision, almost going out of its way to emphasize (after affirming under Issue 1) that "we reach no other questions" and "intimate no views on whether the Commission could have denied the applications if Robinson had been truthful", some 5500 broadcasters, the Commission, Congress, and the general public know not whether the Commission's attempts to delve into "program content", in situations where its reliance is solely on the standard of "public interest, convenience and necessity", are or are not lawful. The matter is one on which this Court should speak.

8. In his concurring opinion (slip op. pp. 5-6), Judge Miller has in effect affirmed the Commission's action under Issue 3 on the ground that Walker's broadcasts violated a criminal statute (18 U.S.C. Sec. 1464);[1]

[1] Walker's suspended sentence has been appealed to the Fourth Circuit under Roth.

a ground which the Commission (unlike its Examiner) expressly eschewed. In thus sustaining an administrative agency on a ground on which that agency did not itself rely, Judge Miller's concurrence contravenes the Chenery doctrine, 332 U.S. 194, 196 (1947).

IV. THE FIRST AMENDMENT, NO-CENSORSHIP, AND DELEGATION ISSUES

As of possible assistance to those Judges who have not heretofore participated in this appeal, we here summarize recent Supreme Court pronouncements which seem to negate the Commission's authority to delve into program content under a standard no more specific and no more substantive than "public interest, convenience, and necessity":

A majority of the present Supreme Court has made it clear that any examination into "program content" by an administrative agency functioning under a broad "public interest" or "general welfare" standard contravenes First Amendment freedoms. Where administrative agencies, in the exercise of their licensing functions, "judge the content of the words and pictures to be communicated", the safeguards of the First and Fourteenth Amendments become applicable save in the exceptional case. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). A violation of the First Amendment arises where a government agency "undertakes to censor the contents of the broadcasting". Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J. concurring). "Any examination of thought or expression in order to prevent publication of 'objectionable material' " is censorship. Farmers Union v. WDAY, Inc., 360 U.S. 525, 527 (1960) (emphasis by the Court). And as four Justices of the Court (Chief Justice Warren, and Justices Black, Douglas, and Brennan) have noted, a point on which the three remaining Justices who are still on the Court did not disagree, Supreme Court decisions to date sustaining freedom of speech and press, whether by licensing or other methods, "do not deal with the content of the speech; they deal only with the conditions surrounding its delivery". Time Film Corp. v. Chicago, 365 U.S. 43, 78 (1961) (emphasis in the original).

Furthermore, and this is all important, a basic concept runs throughout recent Supreme Court decisions to the effect that, since First Amendment freedoms need breathing space to survive, the government may regulate in this area "only with narrow specificity". NAACP v. Button, 31 Law Week, 4063, 4067 (1963); cf. New York Times Co. v. Sullivan, 32 Law Week 4184 (1964); Speiser v. Randall, 357 U.S. 513, 526 (1958). Accordingly "stricter standards of permissible statutory vagueness may be applied to a statute having a particularly inhibiting effect on speech". Smith v. California, 361 U.S.C. 147, 151 (1959). As Justice Brennan speaking for a unanimous Court there said (pp. 150-151):

> Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression by making the individual the more reluctant to exercise it.

Though stated in dissent, Justice Douglas expressed the same thought in United States v. International Union, 352 U.S. 567, 592 (1957):

> When the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistence is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control.

As a consequence, the Supreme Court expressly held in Burstyn that the standard "sacrilegious", no less than the "good character" and "general welfare" standards in Staub v. Baxley, 355 U.S. 313 (1958), lack sufficient specificity where government seeks to regulate evils intertwined with First Amendment freedoms. See Butler v. Michigan, 352 U.S. 380, 383 (1957); Bantam Books, Inc. v. Sullivan, 31 Law Week 4194, 4194-4196 (U.S. Sup. Ct. 1963).

Thus, the fact that the broad standard of "public interest, convenience, and necessity" has been sustained in situations where the Commission has denied licenses on interference grounds, it does not follow that

this standard, which must be read in pari materia with the "no-censorship" prohibitions of Section 326 of the same statute, is sufficiently precise where the Commission attempts thereunder to deny licenses because of "over-commercialization", "not enough public service programming", "too many Westerns", "too much shooting", or "not enough religion". If these matters are current evils of such moment that a majority of the Supreme Court would sustain a "narrowly drawn" Congressional enactment in this field, as not itself impinging on First Amendment freedoms, it seems patent that the general touchstone of "public interest" is far too broad to warrant any delving into program content thereunder by an administrative agency, which is expressly precluded by 47 U.S.C. Sec. 326 from interfering with free speech either on a case-to-case basis or by general regulation.

In short, where the Commission examines into program content under a standard no more specific and no more substantive than "public interest",[1] with the Supreme Court on record that it has not condoned, because of the guarantees of the First Amendment, any delving into program content, and with that Court insisting on narrowly drawn rather than dragnet legislation where First Amendment rights are entangled with evils which Congress may in some degree regulate, its actions are improper.[2]

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[1] See Head v New Mexico, 31 Law Week 4643 (U.S. Sup. Ct. 1963), where Commission counsel relied on the same cases it did here for the proposition that it has exclusive jurisdiction over programming and advertising content (No. 232), and where the Supreme Court in rejecting that contention said (pp. 4644-4645): "Assuming this to be a correct statement of the Commission's authority [i.e., that the Commission may consider and regulate advertising content] we are not persuaded . . . The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulations of professional advertising [by optometrists], particularly when the grant of power was accompanied by no substantive standard other than the "public interest, convenience, and necessity".

[2] This is not to say, in program areas where Congress has already legislated with requisite specificity and where the Commission proceeds under those specific standards, and not (as here) under the general touchstone of "public interest", that the Commission may not look at programming or even at program content which is not within the ambit of the First Amendment's protection. For example, in 47 U.S.C. Sec. 312, Congress has expressly authorized the Commission to revoke

(footnote continued on following page)

Commission counsel have sought to get around the foregoing teachings of recent Supreme Court decisions by arguing that radio is somehow different -- adverting to the impact of radio and television on housewives and teenagers (FCC Br. p. 23), to a scarcity of frequencies (FCC Br. pp. 50-51), and to a statement in Burstyn that each media of communications has "its own peculiar problems" (FCC Br. pp. 52-56).[1] We disagree. The language from Burstyn -- that each medium of communications has its problems and that one medium may not be subject to the same rules governing another -- merely indicates that Congress may enact narrowly-drawn legislation in one field which would not be permissible in another (343 U.S. 495, 502):

> It is further argued that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures would be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here [under the vague standard of "sacrilegious"].

In brief, under doctrines recently enunciated by the Supreme Court, though a broad standard be adequate in other contexts, it cannot be applied in the radio field any more than in other fields, where it collides with the

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(Footnote continued from preceding page)
licenses for broadcasting of "obscenity", "lotteries", and "fraud by radio", and to issue cease and desist orders against any licensee who has violated or failed to observe those criminal provisions, with a further right to revoke a license for any subsequent violation of a final cease and desist order issued in connection therewith. Elsewhere in the Act (47 U.S.C. Sec. 315 and 317), Congress has laid down explicit requirements concerning "political broadcasts", and the making of sponsorship identification announcements. If the Commission were to revoke a license under those explicit provisions of the Act, it would be proceeding under specific statutory provisions which Congress has enacted covering those particular matters, and not under a broad "public interest" standard which the Supreme Court has indicated lacks sufficient specificity where First Amendment rights are involved.

[1] Though contending that the Commission can delve into program content in the field of radio and television under a broad "public interest" standard, Commission counsel have frankly conceded that such action would not be permissible under doctrines laid down by the Supreme Court in recent free speech cases dealing with other (non radio) instrumentalities for communicating thoughts and ideas (FCC Br. pp. 22, 52, 54, 55, 56).

basic commands of the First Amendment, until Congress first legislates with specificity on that score, bearing in mind that even the powers of Congress are highly restricted in this particular area.

V. CONCLUSION

For the foregoing reasons appellant requests a rehearing by the panel which decided this case, and alternatively for an en banc hearing, to consider matters here discussed and not there decided.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Undersigned counsel for petitioner hereby certify that this petition for rehearing is presented in good faith and not for delay.

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